(26,157)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1917.**

## No. 690.

RICHARD H. DANA, INDIVIDUALLY, PLAINTIFF IN ERROR,

*vs.*

RICHARD H. DANA, EXECUTOR OF THE WILL OF EDITH L. DANA, AND CHARLES L. BURRILL, TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

**IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.**

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the District Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Cambridge, within and for the County of Middlesex, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Richard H. Dana executor of the will of Edith L. Dana of said Cambridge, Plaintiff and Charles L. Burrill Treasurer and Receiver General of the Commonwealth of Massachusetts, and the said Richard H. Dana, individually, Defendants, in a plea of a suit in equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Richard H. Dana, individually, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of August in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the District Court, Massachusetts.]

JAMES S. ALLEN,
*Clerk of the District Court of the United States, District of Massachusetts.*

Allowed by

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.*

[Endorsed:] Writ of Error.

*b* COMMONWEALTH OF MASSACHUSETTS,
*Middlesex, ss:*

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I William C. Dillingham, Clerk of said Supreme Judicial Court have hereto set my hand and the seal of said Court this fourteenth day of September, A. D. 1917.

[SEAL.] WM. C. DILLINGHAM, *Clerk.*

*c* *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Richard H. Dana, Executor of the will of Edith L. Dana of Cambridge, in the County of Middlesex in the Commonwealth of Massachusetts, and Charles L. Burrill, Treasurer and Receiver General of said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, on the* fourteenth day of September next, pursuant to a Writ of Error filed in the Clerk's Office of the† Supreme Judicial Court of Massachusetts within and for the County of Middlesex wherein Richard H. Dana, Individually, of Cambridge in said County of Middlesex is the plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts, this fifteenth day of August, in the year of our Lord one thousand nine hundred and seventeen.

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of Massachusetts.*

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*Not exceeding 30 days from the day of signing.
†Name of Court to which Writ of Error is directed.

[Endorsed:] Citation.

*d* Service of the within citation is hereby accepted.
RICHARD H. DANA, *Executor,*
By His Attorney, ELLIOTT B. CHURCH.
CHARLES L. BURRILL,
*Treasurer & Receiver General,*
By WM. HAROLD HITCHCOCK,
*Asst. Attorney General.*

1 COMMONWEALTH OF MASSACHUSETTS,
*Middlesex, ss:*

To All Persons to whom these Presents shall come, Greeting:

Know Ye, that among the records of our Supreme Judicial Court, within and for the County of Middlesex, Anno Domini 1917, it is thus contained, to wit:

2 COMMONWEALTH OF MASSACHUSETTS,
*Middlesex, ss:*

Probate Court.

No. 104,867. In Equity.

ESTATE OF EDITH L. DANA, RICHARD H. DANA, Executor,

vs.

CHARLES L. BURRILL, Treasurer and Receiver General, and RICHARD H. DANA.

*Petition for Instructions.*

To the Honorable the Judges of the Probate Court in and for the County of Middlesex:

Respectfully represents Richard H. Dana of Cambridge in said County of Middlesex as he is the executor of the will of Edith L. Dana, late of said Cambridge, deceased, petitioner, that he brings

this petition against Charles L. Burrill of Boston in the County of Suffolk in said Commonwealth, as he is Treasurer and Receiver General of the Commonwealth and Richard H. Dana, aforesaid, individually, respondents, and alleges the above named respondents to be all the parties interested in the matter of said petition and further represents as follows:

1. Edith L. Dana died July 21, 1915, a resident of Cambridge, Massachusetts, leaving a will which was duly admitted to probate. The respondent Richard H. Dana is sole residuary devisee and legatee under said will. A copy of said will is hereto annexed and marked "Exhibit A."

2. Your petition- is the duly appointed executor of said will of Edith L. Dana.

3 3. Said Edith L. Dana at the time of her death was the owner of real and personal property of the appraised value of $280,244.06.

4. The debts of the estate with the funeral expenses and expenses of last illness and the expenses of administration, as your petitioner is informed and believes and accordingly avers, amount or will amount to at least $19,300.00. The specific bequests amount to $8360.

5. The property of said estate consisted in part of the following:

| | |
|---|---|
| (*a*) Interest under Duluth & Gladstone Real Estate Trust (R. H. Dana, Trustee) appraised at..... | $3000 |
| (*b*) 30 preferred shares of Amoskeag Mfg. Co. appraised at ..... | 2970 |
| 45 common shares Amoskeag Mfg. Co. appraised at.... | 2880 |
| (*c*) 130 shares of Boston Ground Rent Trust appraised at.. | 13000 |

6. If said property mentioned in paragraph 5, or as much as $3000 of the same is to be treated as foreign real estate, then the total of the residue of said estate in Massachusetts, after deducting debts and expenses, will be less than $250,000, and the inheritance tax in Massachusetts upon the husband's share will as the petitioner believes be only 2% instead of 3%, which is the rate when the value of the share of the husband is over $250,000, being a difference of about $2500.

7. Said interest under the Duluth & Gladstone Real Estate Trust consists of an equitable interest in real estate situated entirely outside of Massachusetts in the states of Minnesota and Michigan. It is the law of each of said states that the trust may be enforced as to the real estate in each of those states by the courts in those states respectively without recourse to the laws or the courts of Massachusetts. The trust exists under a deed of trust executed in 1894 by the trustee Richard H. Dana (who is still sole trustee) and three beneficiaries, including the said Edith L. Dana. The interests of said three beneficiaries are not represented by certificates, either negotiable or otherwise. Said deed of trust is shown in "Exhibit B" hereto annexed.

8. The Amoskeag Manufacturing Company is a so-called
4 real estate trust organized and created in 1911 by a deed of trust executed by four trustees. On July 21, 1915, over 75% of the property of said trust consisted of real estate situated entirely in the State of New Hampshire, and a fourth of one per cent of said property consisted of tangible personal property permanently located in said state of New Hampshire, to wit, horses, trucks, automobiles, etc., and 23% of the same consisted of tangible personal property in New Hampshire in the shape of raw material and goods finished and in process of manufacture. All said property was treated in New Hampshire as subject to a yearly tax. Said deed of trust is shown in "Exhibit C," hereto annexed.

There was no real estate situated in Massachusetts, but there was in Massachusetts personal property consisting chiefly of bank deposits amounting to about 3% of the total assets of the trust.

It is the law of New Hampshire that the trust as to said property in New Hampshire may be enforced by the courts of New Hampshire without resort to the laws or the courts of Massachusetts. The interests of the beneficiaries of said trust are represented by so-called negotiable certificates.

On July 21, 1915, there were twelve trustees two of whom were residents of New Hampshire and the others were residents of Massachusetts.

9. The Boston Ground Rent Trust was organized and created in 1889 by a deed of trust executed by five trustees. The interests of beneficiaries are represented by so-called negotiable certificates. On July 21, 1915, 85% of the property of the said trust consisted of real estate situated entirely outside of Massachusetts. Said trust had no real estate situated in Massachusetts. It had personal property in Massachusetts consisting of a bank account and securities amounting to about 6% of the total assets of the trust. On July 21, 1915, there were five trustees all of whom were residents of Massachusetts.

It is the law of all the states in which said real estate is situated
5 that the trust as to said real estate may be enforced by the courts of said states without resort to the laws or the courts of Massachusetts. Said deed of trust is shown in "Exhibit D," hereto annexed.

10. The number of so-called real estate trusts holding real estate within or without Massachusetts is now very large and the shares in the same held by residents of Massachusetts exceed in value the sum of fifty millions of dollars. Such shares have not been treated by the assessors of our cities and towns as subject to annual taxation, in addition to the taxes assessed upon the property held by the trustees under St. 1909 C. 490 Part I.

11. The respondent the said Treasurer and Receiver General claims that all said property mentioned in paragraph 5 of this bill is to be considered as a part of the estate of the said Edith L. Dana situated in Massachusetts for the purposes of determining the inheritance tax to be paid by your petitioner as executor upon the share of said husband.

12. The respondent Richard H. Dana was the husband of the said Edith L. Dana. He is the sole residuary devisee and legatee under her said will. He claims that so much of the property mentioned in said paragraph 5 of the bill as consists of an equitable interest in real estate situated outside of Massachusetts is not to be considered as property situated in Massachusetts, and is not to be taken as a part of the estate in Massachusetts in determining the inheritance tax upon his share as residuary devisee and legatee.

13. By reason of these conflicting claims your petitioner, as executor, needs instructions as to his duty in the premises.

Wherefore your petitioner prays as follows:

First. That he may be instructed as to the proper basis upon which to compute the inheritance tax due the Commonwealth of Massachusetts.

Second. That he may have such other and further relief as the nature of the case may require.

By his Attorney, ELLIOTT B. CHURCH.

Filed August 1, 1916.

6 "EXHIBIT A."

*Will of Edith L. Dana.*

I, Edith L. Dana, wife of Richard H. Dana, the third of that name in line of descent, of Cambridge in the County of Middlesex and Commonwealth of Massachusetts, make this my last will, revoking my former wills and disposing of all my property and estate whether acquired heretofore or hereafter.

I appoint the said Richard H. Dana sole executor of this my will, and if he is not living, then Arthur H. Brooks and Roger D. Swain, both of said Cambridge in said county and commonwealth.

1. I give the bust of myself and the portrait of my sons Richard and Henry by Rose Lamb to my son Richard; the portraits of my sons Richard and Henry by E. W. Longfellow and the portrait of my father and myself by Healey to my son Henry; my clothing, personal ornaments and jewelry to my daughters Frances and Delia, except my gold and blue mosaic necklace which I give to my daughter-in-law, Jessie Dana; the painting of a fruit-piece by Daheim to my son Edmund; the painting of "A Roadside Pool" by Appleton Brown to my son Allston; my repousse silver fruit dish marked "E. L." to my daughter-in-law, Dorothy Dana; the picture of boats on a beach by S. S. Tuckerman to my son-in-law, Henry C. deRham; my Valpy edition of Shakespeare to my son-in-law, Robert H. Hutchinson; the bronze copy of the Diana of Gabi to my daughter-in-law, Nathalie Dana; the following pieces of furniture from the Wadsworth-Longfellow house in Portland to my grandchildren:

To Henry Longfellow de Rham the square mahogany writing table and chair;

to Richard Dana de Rham the chintz-covered wing chair;
to Richard Henry Dana 3rd the bureau;
to Dorothy Dana, Jr., the sewing-table and rocking chair;
To Allston Dana, Jr., a chair and wash-stand;
7 to Thomas Appleton Dana a portrait of Thomas G. Appleton by Francis Alexander;

To my grandson Richard Dana de Rham the portrait of his mother by E. W. Longfellow;

and I direct my executors to take some souvenir from among my pictures, silver or furniture for each other grandchild that may survive me and a thousand dollars ($1,000) each free of legacy tax for the following six persons: Rosamond Dana Wild, Jr., Charlotte Dana Lyman, Richard Dana Lyman, Richard Dana Skinner, Christine Farley, 16 Lowell Street, Cambridge, Mass., Edith Kimball Pearson, New York.

2. My share in the "Craigie" House and Lot, 105 Brattle Street, Cambridge, with my interest in the chattels in said house, I devise and bequeath to my brother and sisters with whom I own the same in common and to the survivors and survivor of them for life, with power to make a donation of said house, lot and such of said chattels as they may think best for a permanent memorial to my father, the late Henry Wadsworth Longfellow, substantially in the terms of a deed of trust and gift of the premises dated the twenty-eighth day of October, 1913, a deed already signed by myself and my sister, Mrs. Thorp, said deed, if duly executed, to take the place of this clause of my will. My interest in so much of the chattels as is not so disposed of and the whole of the premises, in case such a donation is not made, I devise and bequeath to those who would be my heirs at law had I died at the date of the death of the last survivor of my said brother and sisters.

3. As I consider my children suitably provided for after my death by the trusts under the will of my late uncle, Thomas Gold Appleton, I give the residue of my property to my said husband and his heirs and assigns.

In witness whereof I hereto set my hand and seal this 30th day of October, 1913. EDITH L. DANA. [SEAL.]

8 Signed, published and declared by the above named Edith L. Dana to be her last will and testament, in all our presence, who, in her presence and at her request, and in the presence of each other, have hereto set our hands. HELEN GROZIER.
FULTON CUTTING.
FAIRFIELD GOODALE.

"EXHIBIT B."

Duluth and Gladstone Real Estate Trust.

*Trust Agreement and Declaration of Trust.*

I, Richard H. Dana of Cambridge in the County of Middlesex and Commonwealth of Massachusetts, hereby declare and acknowledge

that I hold the two parcels of real estate situated in Duluth in the State of Minnesota and conveyed to me by deed from Central Investment Company of Savannah, dated the twenty-third day of August, 1894, and recorded in the St. Louis County Registry of Deeds Book 81 page 573 and by deed from George H. Crosby et ux. dated the first of December, 1894, and recorded in said Registry Book 91 page 573 and certain parcels of real estate situated in Gladstone, Delta County, Michigan, conveyed to me by deed from Francis W. Hale otherwise called Frank W. Hale of Boston in the County of Suffolk and Commonwealth of Massachusetts and Alice C. Hale his wife dated twenty-first of October, 1894, and recorded in the Registry of Deeds for Delta County, Michigan, Book 3 Page 385, upon the Trusts and agreements herein set forth, and we the said Richard H. Dana, Edith L. Dana his wife and the said Francis W. Hale, subscribers hereto, hereby acknowledge and agree to and among each other and in consideration of our mutual agreements as follows:

1. We mutually acknowledge that the purchase price of the said Duluth Real Estate is Eighteen thousand and sixty-six dollars
9 ($18,066), that the said Edith has paid three quarters of the same ($13,549.50) and the said Richard has paid one quarter of the same ($4,516.50) and that the said Richard has paid Two thousand five hundred dollars ($2,500) towards the said Gladstone real estate and improvements and the said Hale the balance of the said Gladstone real estate and improvements.

2. Notices delivered personally or mailed, postage pre-paid, at least five days beforehand addressed to any subscriber at the last address given by him in writing to the trustee for the time being shall be deemed binding.

3. The said Richard or any of his successors in trust may resign this trust by giving written notice thereof to the subscribers. In case of the death, resignation, incapacity or removal of a trustee hereunder, the successor shall be appointed by any court in said County of Suffolk having the power to appoint a trustee under a written instrument of trust, unless at least two thirds in interest and half in number of the subscribers agree in writing on a successor.

4. The word "subscriber" or "subscribers" or any original subscriber mentioned by name shall mean one or ones original hereto, or a successor in trust, or the heirs, representatives or assigns of a subscriber, unless such meaning is clearly inconsistent.

5. No assignment of a subscriber's interest shall be made of less than one half his original interest and not to more than one person, though more than one person may take under a will or as distributee. Any assignment to be valid must be in duplicate, each countersigned by the trustee and one preserved by him. On any new assignment of the same interest the old one must be delivered to the trustee to be cancelled to the amount of the interest assigned.

6. The rentals of the said Gladstone real estate shall be collected by the said trustee and therefrom he shall pay first the taxes, repairs, insurance and other expenses incident to the management of said Gladstone real estate, or what remains thereof at any time unsold, and then out of the balance of said rentals he shall pay to the

said Richard One hundred and twenty-five dollars ($125) a year and to the said Edith Four hundred and fifty-one 65/100 dollars ($451.65) a year each payable one half on the first of April and one half on the first of October in each year, from Oct. 1st, 1894, the first payment being due April 1st, 1895, and the said Hale guarantees and agrees to make up the deficiency if any of the Gladstone rentals for these purposes. If the said Hale fails to make up any such deficiency in payments to the said Richard or Edith as above, he shall pay 5% per annum simple interest on such deficiencies till paid, and he pledges for himself his heirs and assigns his interest in the said Gladstone and Duluth real estate hereunder for this purpose. The balance of said rentals shall be paid to the said Hale. The said Richard and Edith shall each pay one quarter of the taxes and expenses incident to the management of the said Duluth real estate, or so much thereof as remains unsold at any time, and the said Hale shall pay the remaining half of the same, to which his balance of Gladstone rentals may be applied.

7. On the sale of the Duluth real estate, or any portion thereof one quarter of the proceeds shall be paid to the said Edith, one quarter to the said Richard, $9,033.00 to the said Edith and the balance shall be paid to the said Hale subject to clauses six and ten, or to any special arrangements unanimously agreed to in writing by the trustees and subscribers hereto.

In case of the payment to the said Edith of the whole or any part of said $9,033.00 there shall be deducted thereafter from the $451.65 annual rent payable to her under clause 6 a proportionate part thereof.

8. On the sale of the said Gladstone real estate $2,500.00 shall be paid to the said Richard, out of the balance shall be paid any part of the $9,033 and payments and interest as above, not then paid to the said Edith and the balance shall be paid to the said Hale subject to clauses six and ten, or any special arrangement agreed to in writing by the trustees and subscribers hereto. In case of the payment to the said Richard of the whole or any part of said $2,500 there
11 shall be deducted thereafter from the $125 annual rent payable to him under clause 6 a proportionate part thereof.

9. Said real estate remaining unsold at the end of twenty years shall be sold, and at the end of ten years shall be sold at the written request of any subscriber having an interest and before ten years the whole or any part or parts thereof at the written request of Mrs. Dana in case of the failure of the above Hale to fulfill the conditions herein mentioned as long as she has any interest in the same, or of any two subscribers representing at least one half of the interest in said Duluth real estate.

10. A trustee may retain as much of the proceeds of any sale of any part of said real estate as is expedient for the payment of taxes and expenses incidental to the management of the rest.

11. Every trustee shall keep books of account and of records of the management and sales, and these books shall always be open to the inspection of subscribers.

12. Each trustee shall be paid his reasonable expenses and for actual work and time reasonably required hereunder.

13. The sales may be made at public auction or at private sale, and the purchaser shall have no concern as to the application of the purchase money.

14. A trustee hereunder shall be responsible only for a wilful breach of trust and only for his own acts.

15. A certificate duly signed, sworn to and acknowledged by a trustee hereunder shall be conclusive as to all facts contained therein affecting title hereunder, in case any such facts are required to be established.

This instrument is to be of force from October first, 1894.

Witness our hands and seals this 18th day of October, 1894.

RICHARD H. DANA.
EDITH L. DANA.
FRANK W. HALE.

JOHN HAMILTON MORSE to R. H. D.
ROSAMUND D. WILD to E. L. D.
HENRY C. LAHEE to F. W. H.

12 "EXHIBIT C."

Amoskeag Manufacturing Company.

*Declaration of Trust.*

A Declaration of Trust made at Manchester, New Hampshire, this twenty-ninth day of September, 1911.

Trustees.

Whereas Charles W. Amory of Boston, Theophilus Parsons of Mattapoisett, Frederick C. Dumaine of Concord, all in the Commonwealth of Massachusetts, and Frank P. Carpenter of Manchester in the State of New Hampshire, (hereinafter called the Trustees), propose to acquire from the Amoskeag Manufacturing Company, a corporation organized under the laws of New Hampshire, all the assets and business of the said corporation, and all its property, real and personal of whatever nature, and to accept from the said corporation a conveyance and transfer of the same;

And whereas all the said property so conveyed and transferred to the Trustees together with any other property hereafter acquired by them is to be held, used and managed upon the trusts herein declared.

Declaration of Trust.

Now therefore the Trustees hereby declare that they will hold the said property so conveyed and transferred to them and all property which they may hereafter acquire as such Trustees, together with

the proceeds thereof, in trust to manage and dispose of the same for the benefit of the holders from time to time of the certificates of shares issued and to be issued hereunder, in the manner and subject to the stipulations herein contained, namely:

## Article I.

### Name.

1. The Trustees in their collective capacity shall be designated so far as convenient and practicable as "Amoskeag Manufacturing Company" and under that name shall so far as convenient and practicable conduct all their business and execute all instruments in writing.

### Appointment of Secretary and Additional Trustees.

2. The four Trustees herein named shall as soon as practi-
13 cable appoint a Secretary to serve until the first annual meet ing of the shareholders. They shall also as soon as practicable appoint eight additional Trustees by an instrument in writing, signed in duplicate, by the said four Trustees, and said appointment shall take effect when one of said instruments shall have been filed with each of the depositaries then having custody of this instrument.

Upon the filing of such instrument the trust estate shall vest, without further act or deed, in the said additional Trustees together with the said four Trustees named herein, but said four Trustees may ir their discretion make a formal transfer thereof, in such manner and form as they may deem proper.

### Term of Office.

The said instrument shall designate four of the said additional Trustees to hold office until the first annual meeting of the shareholders, and four of the said additional Trustees to hold office until the second annual meeting of the shareholders, and the four Trustees herein named shall hold office until the third annual meeting of the shareholders, provided, however, that the Trustees hereunder shall in all cases hold office until their successors have been elected.

### Powers.

3. The Trustees shall hold the legal title to all property at any time belonging to this trust, and subject only to the specific limitations herein contained they shall have the absolute control, management and disposition thereof, and shall likewise have the absolute control of the conduct of all business of the trust. The naming of any specific duties and powers herein shall not be construed as limiting the general powers conferred upon the Trustees.

Manufacturers. Purchase of Real and Personal Property. Shares and Securities. Investments and Loans. Borrowing Money.

4. The Trustees are authorized to pay the debts of the Amoskeag Manufacturing Company, the corporation above mentioned; to establish, manage and carry on within or without the State of New Hampshire the manufacture and sale of cotton, woolen and worsted goods, and any other lawful manufactures, and also any other business or trade incidental thereto, and any business which has to do with the acquisition, production or manufacture of raw material, ma-
14 chinery or supplies used in such manufacturing; to buy, hold and use for the purposes of the trust business real and personal property of every kind, and (subject to the provisions of the following paragraph) the same to sell, lease, rent and convey; to buy or sell power; to acquire, and hold, such stocks, shares and securities of corporations or associations as in their discretion may be deemed necessary or useful in carrying on the business of the trust, and the same to sell or exchange in their discretion; to invest or loan any moneys which may come into their hands, and which in their judgment are not needed in the conduct of any business in which they are engaged, in any manner which may seem to them prudent and expedient; to borrow money and (subject to the provisions of the following paragraph) mortgage or pledge any property in their hands upon such terms and for such purposes as they may deem expedient. In no event shall any purchaser of any property of the trust be bound to see to the application of the purchase money or other consideration.

Sale or Mortgage of Mills. Sale to Corporation.

5. No mills belonging to the trust shall be sold, exchanged, mortgaged or leased unless a majority of the shareholders represented at or voting at a regular or special meeting, the call for which gives notice that the subject is to be acted upon, give their approval, provided however that the Trustees may cause to be formed under the laws of any state or country, with such powers as they may deem advisable, a corporation or corporations to take over the trust property or any of it, and may, without such approval, sell, convey and transfer the trust property or any of it to such corporation or corporations taking in exchange therefor all the shares and securities (except shares necessary for the qualification of directors) of such corporation or corporations.

Taxes.

6. The Trustees shall pay all taxes or assessments of whatever nature, national, state or municipal, upon the property of the trust or any portion thereof.

Evidence of Powers.

7. So far as strangers to the trust are concerned, a resolution of the Trustees certified as such by their Clerk or the Secretary, and

authorizing a particular act to be done, shall be conclusive evidence that such act is within the powers of the Trustees.

Shares, How Held. Suits.

8. The Trustees may hold shares of stock belonging to the trust in their own names or the names of any persons or corporations they may select, and may vote in person or by proxy upon the same and collect the dividends thereon; receipt for all sums of money at any time coming to the trust; employ counsel; begin, defend and settle suits; compromise or refer to arbitration any claims in favor of or against the trust.

Meetings of Trustees.

9. The Trustees may adopt and use a common seal. They shall hold meetings in such places and at such times as they may determine and other meetings from time to time upon the call of the President, Treasurer, or any two of the Trustees, notices of such meetings to be given in such manner as the by-laws may provide.

Quorum. By-laws. Election of President, Treasurer, etc. Removal of Officer or Agent.

Six trustees present at a meeting shall constitute a quorum, and any action taken by the majority at such meeting shall have the same validity and effect as if voted and consented to by all the Trustees. The Trustees may adopt, and amend from time to time, by-laws for the conduct of their business, and in such by-laws or in regulations adopted at any meeting may define the duties of their officers, agents, servants and representatives. They shall annually elect from among their number a President, and shall also elect, from among their number or otherwise, a Treasurer, a Clerk, and in their discretion Vice-Presidents, Assistant Treasurers, Assistant Secretaries, Assistant Clerks, and such other Officers or agents as they may deem advisable, and may act in any manner by or through any such officer or agent. Any officer or agent elected or appointed by the Trustees except the President or Treasurer may be removed by vote of the Trustees at any meeting at which a quorum is present and the President, Treasurer or Secretary may be removed by a majority vote of all the Trustees.

Vacancies. Committees.

They may fill vacancies in offices, including that of Secretary, and may appoint temporary officers. They may in their discretion
16 appoint from among their number an Executive Committee or other committees, to whom they may delegate such of their powers as they think proper.

Inspection of Accounts.

10. The Trustees shall from time to time determine whether and to what extent and at what times and places, and under what con-

ditions and regulations, the accounts and books of the Trustees or any of them, shall be open to the inspection of shareholders, and no shareholder or other person shall have the right to inspect any account or book or document except as so determined.

## Article II.

Shareholders' Meetings. Notice. Voting Powers. Business Stated in Call.

1. Meetings of the shareholders shall be held in the City of Manchester in the State of New Hampshire. Annual meetings shall be held in the month of October in each year beginning with the year 1912 at such place, on such day and at such hour as the Trustees may designate. Special meetings may be called by the President or by any four of the Trustees. Notice of shareholders' meetings shall be given by the Secretary by mailing such notice to each shareholder at his registered address at least seven days before such meeting. Each holder of shares shall be entitled to one vote for each share held by him, and any shareholder may vote by proxy. No business shall be transacted at any meeting of the shareholders except the business of which notice has been given in the call for the meeting. No business, except to adjourn, shall be transacted at any meeting of the shareholders unless the holders of a majority of all the shares outstanding are present in person or represented by proxy.

Election of Trustees, Secretary. Vacancies. Acceptance of Trust to Be Filed.

2. The shareholders shall at each annual meeting or adjournment thereof elect four Trustees to serve for the term of three years next ensuing, and a Secretary to serve for the term of one year. In case of the death, resignation, or inability to act of any of the said Trustees, the remaining Trustees shall fill any vacancies for the unexpired term. As soon as any trustees elected by the shareholders or by
17 the Trustees to fill a vacancy have accepted this trust, the trust estate shall vest in the new Trustees or Trustee, together with the continuing Trustees, without any further act or conveyance, but it shall be the duty of any retiring Trustee or of the administrator or executor of any deceased Trustee to make a formal transfer if the same is deemed necessary or advisable by the continuing Trustee. Upon the election of any Trustee by the shareholders or by the remaining Trustee, he shall execute an acceptance of this trust, which, together with a certificate of the Secretary or the Clerk of the Trustees of the election of such Trustee, shall be forthwith filed with the depositaries at that time having the custody of this instrument.

## Article III.

Number of Shares. Dividends on Preferred. Cumulative Dividends.

1. The beneficial interest in this trust shall in the first instance be divided into not exceeding one hundred and fifteen thousand two

hundred (115,200) preferred shares, and not exceeding one hundred seventy-two thousand eight hundred (172,800) common shares. Such shares or any of them may be issued, sold or disposed of by the Trustees for such consideration and at such times and to such persons as they shall deem advisable. The preferred shares, and all preferred shares issued thereafter, shall entitle the holders to a cumulative semi-annual dividend at the rate of four and one-half dollars per annum, and no more, the same to be set apart before any dividend shall be paid or set apart for the common shares. If for any period of six months a semi-annual dividend at the rate of four and one-half dollars per annum is not paid on said preferred shares, the said unpaid dividend or so much thereof as remains unpaid shall be a charge on the net earnings payable before any dividends are paid on the common shares.

Dividends in Liquidation. Distribution of Securities.

2. In case of liquidation of all the assets of the trust, the proceeds, if in cash, shall be first applied to the payment to the holders of the preferred shares of the sum of one hundred dollars ($100)
18 per share and of any dividends thereon or portions thereof remaining unpaid, and the balance remaining thereafter shall be divided among the holders of common shares in proportion to their respective holdings. In case of the liquidation of all the assets of the trust or the winding up of its affairs, if the Trustees shall elect to distribute shares, securities or obligations instead of cash, in whole or in part, they shall distribute the same so that the relative rights of the holders of preferred and common shares, as above stated, shall be preserved. The determination of the Trustees as to such relative rights shall be taken and operate as prima facie correct and binding on all interests concerned, and shall be conclusive in any event after such distribution has been made.

Certificates for Shares.

3. The certificates of ownership of the said shares shall be in substantially the forms hereto annexed, marked "A."

Declaration of Dividends.

4. The trustees may from time to time declare and pay dividends, but the declaration of such dividends and the amount and payment thereof shall be wholly within the discretion of the Trustees whose decision shall be absolute and shall conclude all shareholders (except as to the right of the holders of preferred shares to receive dividends before any are paid or set apart on the common shares).

Death of Shareholder. Shareholder not Entitled to Accounting.

5. Shares shall evidence only the rights specifically set forth in this instrument. The death of a shareholder or Trustee during the

continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representatives of the deceased shareholder to an accounting, or to take any action in the courts or elsewhere against the Trustees, but the executors, administrators or assigns of any deceased shareholder shall succeed to the rights of such decedent under this trust and be entitled to a certificate in their own names upon surrender properly endorsed of the certificate or certificates for the shares owned by such decedent. The ownership of shares hereunder shall not entitle the shareholder to any title in or to the trust property whatsoever, or right to call for partition or division of the same, or for an accounting.

19 Increase of Shares.

6. The trustees may from time to time by vote of at least two-thirds in interest of the preferred shareholders and a majority in the interest of the common shareholders, represented at any meeting called for the purpose or at any regular meeting in the call for which notice shall be given of the proposed action, but not otherwise, issue and dispose of additional preferred or common shares, or both, in such manner, to such persons, and on such terms and conditions and otherwise in all respects as may be determined at such meeting.

## Article IV.

### Liability of Trustees and Shareholders.

1. The Trustees shall have no power to bind the shareholders personally by any act, neglect or default, and all shareholders of the association, and all persons or corporations extending credit to, contracting with, or having any claim against the Trustees shall look only to the funds and property of the trust for payment of such contract or claim or for any indemnity or for the payment of any debt, damage, judgment, or decree, or any money that may otherwise become due or payable from the Trustees, so that neither the Trustees nor the shareholders shall be personally liable therefor.

### Stipulation in Notes. Stipulation in Contracts.

2. In every note or contract for the payment of money borrowed it shall be the duty of the Trustees or other officers or agents, expressly to stipulate that neither the Trustees nor the shareholders shall be held to any personal liability under or by reason of such note or contract. The like express stipulation shall be embodied in other written contracts whenever the Trustees in their discretion so determine.

### Trustees Not Liable.

3. The Trustees shall not be liable for errors of judgment in acquiring or holding property or conducting the business of the trust,

or for any loss arising out of any investment nor for any act or omission to act performed or omitted by them in the execution of this trust in good faith, nor shall they be liable for the acts or omissions of each other nor of any officer, agent or servant appointed by or acting for them.

20

## Article V.

### Termination of Trust.

1. This trust shall continue for the term of twenty-one years after the death of the last survivor of the persons whose names are signed hereto, and of the children of said persons who are living at the time of the execution hereof, at which time the then Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same as hereinbefore provided among the holders of shares hereunder according to their respective holdings; provided, that if prior to the expiration of said period, the holders of at least two-thirds of the preferred shares and two-thirds of the common shares then outstanding shall at a meeting called for the purpose, or at any regular meeting in the call for which notice is given of the proposed action, vote to terminate or continue this trust, then the trust shall either terminate or continue in existence for such further period as may then be determined. For the purpose of winding up the affairs and of liquidating the assets of the trust, the then Trustees shall continue in office until such duties have been fully performed.

### Amendments. Amendments to be Filed.

2. This declaration of trust may be amended or altered, (except as regards the liability of the Trustees and the shareholders), at any annual or special meeting of the shareholders by vote of the holders of at least two-thirds of the preferred shares and of two-thirds of the common shares, and provided that notice of the proposed amendment or alteration shall have been given in the call for the meeting annual or special, and in case of such alteration or amendment a certified copy of the vote amending or altering the same shall be attached to and made a part of this agreement, and a copy thereof shall be filed with the depositaries at that time having the custody of this instrument.

## Article VI.

### Subject to Laws of New Hampshire.

1. This instrument is executed in the State of New Hampshire and with reference to the laws thereof; and the rights of all parties
21 and the construction and effect of each and every provision hereof shall be subject to and construed according to the laws of said state.

Depositaries.

2. This instrument and a duplicate original of the same shall be filed with the Amoskeag National Bank in the City of Manchester, New Hampshire, and with the Old Colony Trust Company in the City of Boston, but the Trustees shall have power at any time to change such depositaries.

In witness whereof the said Trustees, Charles W. Amory, Theophilus Parsons, Frederick C. Dumaine, and Frank P. Carpenter, hereinbefore mentioned, have hereunto set their hands and seals in token of their acceptance of the trust hereinbefore mentioned, for themselves and their successors, the day and year first above written.

CHARLES W. AMORY. [SEAL.]
THEOPHILUS PARSONS. [SEAL.]
FREDERIC C. DUMAINE. [SEAL.]
FRANK P. CARPENTER. [SEAL.]

"EXHIBIT D."

*The Boston Ground Rent Trust Agreement and Declaration of Trust.*

Made this Twentieth Day of July, A. D. 1889.

We, the subscribers, hereby agree to and with each other, and in consideration of our mutual agreements, as follows:

1. We agree to pay, at any time within two years from the date hereof, to the trustees hereunder, the amounts set against our names, respectively, in such instalments and at such times as said trustees may require; but they shall not require any payment until the total amount subscribed amounts to one million dollars. In case any subscriber neglects to pay any instalment of his subscription within twenty days, after the date of the call, the amount of his subscription then unpaid shall be cancelled at the option of said trustees.

22 2. John Quincy Adams of Quincy, William Minot, Jr., Charles E. Cotting and Laurence Minot, all of Boston, and Moses Williams of Brookline, all of the Commonwealth of Massachusetts, shall be and are hereby made trustees hereunder.

3. Notices delivered personally, or mailed with prepayment of postage, ten days beforehand, to any subscriber hereto or any shareholder, or to his attorney designated for the purpose, at the residence given on his subscription or stated in his certificate, or to the address given by him from time to time to said trustees, shall be deemed binding.

4. Said trustees shall use all money paid to them as such, except as hereinafter provided, for the purchase and improvement of real estate in the cities of the United States of America, and especially of property leased upon long terms or ground rents, and all real

estate so purchased shall be conveyed to them in joint tenancy as trustees hereunder.

5. Said trustees shall have, as such, as absolute control over and disposal of all real estate held by them at any time under this trust as if they were the owners thereof, including the power to sell for cash or credit at public or private sale, to mortgage with or without power of sale, to lease or hire for improvement or otherwise for a term beyond the possible termination of this trust or for any less term, to let, to exchange, to release and to partition. But the indebtedness of said trust shall never exceed forty per cent. of the amount of capital stock actually paid in at par. This provision shall not, however, affect the title of any mortgagee, and no purchaser or mortgagee shall be liable for the application of money paid or lent. In all leases and mortgages it shall be stipulated that the shareholders shall not be personally liable thereon.

6. Said trustees may set aside not more than ten per cent. of the annual income for a contingent fund, or sinking fund, or both. They shall divide the net income of the property held by
23 them under this trust among the shareholders annually, or oftener, at their discretion, and their decision as to what constitutes net income from time to time shall be final. Said contingent or sinking fund, and any money waiting investment, may be put at interest or invested and re-invested in interest-bearing securities by said trustees at their discretion.

7. Said trustees may from time to time hire suitable offices for the transaction of the business of the trust, appoint such officers and agents, including an agent for procuring subscriptions to this agreement, as they may think best, fix their compensation and define their duties.

The compensation of said trustees shall not at any time exceed five per cent. of the income of the property held by them under this trust.

8. Said trustees shall issue certificates in such form as they shall deem best for each sum of one thousand dollars or for multiples thereof paid to them under this agreement; but no certificate shall be issued for any less sum than one thousand dollars, which shall be deemed a share.

9. Shares may be transferred on the books of said trustees by the person named in the certificate thereof, his attorney or legal representative, upon the surrender of the certificate, and a new certificate, shall be issued to the transferee, who shall thereupon become subject to the terms of this agreement; but no share shall be sold until the holder thereof shall have first in writing offered it for sale to said trustees, who shall as such trustees have the option, for ten days after the receipt of such offer, of buying the same at the last preceding appraisal made by them. They shall make such appraisal annually or oftener, as they may deem best. Shares so purchased by said trustees may be held as part of said contingent or sinking fund, or sold by them, at their discretion. Devises by will, distribution of the estates of persons dying intestate, and distribution of

trust funds among those entitled thereto upon the termination of trusts, shall not be deemed sales for the purpose hereof.

24 10. Said trustees may from time to time at their discretion invite and receive further subscriptions for the purpose of increasing the capital of the trust, giving preference, upon such terms and conditions as they shall deem best, to existing shareholders. All subscriptions shall be subject to the terms of this agreement.

11. No assessment shall ever be made upon the shareholders.

12. The books of said trustees shall always be open to the inspection of shareholders.

13. Any trustee under this agreement may resign his trust by a written instrument signed by him, and acknowledged in the manner prescribed for the acknowledgment of deeds; and such instrument shall be recorded in the Registry of Deeds for the County of Cook in the State of Illinois. Any vacancy occurring from any cause at any time in the number of said trustees shall be filled by the remaining trustees by an instrument in writing, acknowledged and recorded as aforesaid, and such new trustees shall have the same power as if originally named herein. When any trustee is absent from the Commonwealth of Massachusetts, or incapable by reason of disease, the other trustees shall have all the powers hereunder; and any trustee may by power of attorney delegate his powers for a period not exceeding six months at any one time to any other trustee or trustees hereunder, provided that in no case shall less than three trustees actually exercise the powers hereunder. The term "said trustees" used in this agreement shall be deemed to mean those who are or may be trustees for the time being. No trustee shall be required to give a bond.

14. At and upon the expiration of twenty years, after the death of the last survivor of the following-named persons:

Walter Abbott, son of Jere Abbott of Boston;
George C. Adams, son of John Quincy Adams of Quincy;
Oliver Ames, son of Frederick L. Ames of Easton;
Reginald Bangs, son of Edward Bangs of Wareham;
Boylston A. Beal, son of James H. Beal of Boston;
25 Robert P. Blake, son of S. Parkman Blake of Boston;
Causten Browne, Jr., son of Causten Browne of Boston;
Edmund D. Codman, son of Robert Codman of Boston;
David H. Coolidge, Jr., son of David H. Cooiidge of Boston;
Philip Dexter, son of William S. Dexter of Boston;
John M. Howells, son of William D. Howells of Boston;
Laurence Minot, son of William Minot of Boston;
William Minot, 3d, son of William Minot, Jr., of Boston;
James Otis Porter, son of Alexander S. Porter of Beverly;
Evans Preston, son of William G. Preston of Boston;
Abbott Lawrence Rotch, son of Benjamin S. Rotch, late of Milton;
James J. Storrow, Jr., son of James J. Storrow of Boston;
Samuel Wells, Jr., son of Samuel Wells of Boston;

Or at such earlier time as three-fourths in value of the shareholders may, by an instrument in writing, signed and acknowledged in the

manner prescribed for the acknowledgment of deeds, and recorded in the office of the Recorder of Deeds for said Cook County, Illinois, appoint, said trustees shall terminate this trust by selling all property then held by them, as such, and dividing the proceeds among the shareholders.

Provided, however, that upon the request of three-fourths in value of the shareholders, in writing, signed, acknowledged and recorded as above provided, said trustees may, if it seems to them judicious so to do, convey the trust property to new or other trustees, or to a corporation, according to the terms of such request, and in the manner stated therein, being first duly indemnified for any outstanding obligation; and said trustees upon filing in said Registry of Deeds for Cook County, Illinois, a certificate that they have complied with such request, shall be under no further obligation.

Provided, however, and it is especially understood and agreed, that nothing in this clause contained shall be construed as making it obligatory upon said trustees to comply with such request to convey.

26 15. Said trustees shall be responsible only for a wilful breach of trust, and each shall be responsible only for his own acts.

16. Meetings of the shareholders may be called by any two of the trustees, and shall be called upon the written request of five or more shareholders. The shareholders may for their own government pass by-laws and elect necessary officers, and may instruct the trustees hereunder in any manner not inconsistent with the powers herein or hereafter given said trustees, or with the acquired rights of third parties. The vote or agreement in writing of three fourths in value of the shareholders shall be binding upon all and upon the trustees, and this agreement may be altered or added to accordingly; but the rights of third persons shall not be affected, nor shall any third person be deemed to have notice thereof, until a certificate setting forth such vote or agreement, signed by a majority of the trustees and duly acknowledged, shall be recorded in the Registry of Deeds for said Cook County, Illinois, and such certificate shall be conclusive as to the validity of the vote certified and all facts therein stated. A like certificate so recorded shall also be conclusive as to all facts affecting title.

In witness whereof, we have hereunto set our hands and stated the amount of our respective subscriptions on the day and year above written.

(Recorded in the Registry of Deeds for Cook County, Illinois, in Book 2736, at page 588.)

A true copy.

Attest,

N. H. PHILBRICK,
*Asst. Register.*

*Answer of Treasurer and Receiver-General to Petition for Instructions.*

And now comes Charles L. Burrill, as he is Treasurer and Receiver-General of the Commonwealth, and for answer to the
27 above-entitled petition for instructions says that he is informed and believes that all the allegations of fact contained therein are true.

And further answering, he claims that all the property described in the petition as a part of the estate of the testatrix is property, or an interest therein, within the jurisdiction of the Commonwealth belonging to an inhabitant of the Commonwealth and that it is, therefore, subject to a legacy and succession tax under the provisions of section 1 of part IV of chapter 490 of the Acts of 1909, together with any amendments or additions thereto.

CHARLES L. BURRILL,
*Treasurer and Receiver-General,*
By HENRY C. ATWILL,
*Attorney-General,*
By WM. HAROLD HITCHCOCK,
*Assistant Attorney-General.*

A true copy.
Attest:
N. H. PHILBRICK,
*Asst. Register.*

Filed, August 1, 1916.

*Answer of Respondent Richard H. Dana, Personally.*

And now comes the respondent Richard H. Dana, acting individually, and for answer to the petition in the above entitled case says that he admits all the allegations of fact therein contained.

And further answering, he says that his claim is as stated in said petition.

By His Attorney, HOLLIS R. BAILEY.

A true copy.
Attest,
N. H. PHILBRICK,
*Asst. Register.*

Filed, August 1, 1916.

28 *Decree.*

Upon the petition of Richard H. Dana, executor under the will of Edith L. Dana, brought against Charles L. Burrill, as he is Treasurer and Receiver-General of the Commonwealth, and Richard H. Dana, praying for instructions as to whether certain property described therein, namely,—

Interest under Duluth and Gladstone Real Estate Trust,
30 preferred shares Amoskeag Manufacturing Company,
45 common shares Amoskeag Manufacturing Company,
130 shares Boston Ground Rent Trust,

is subject to a legacy and succession tax, after hearing all parties the court doth order and decree that said property is property within the jurisdiction of the Commonwealth belonging to an inhabitant of the Commonwealth within the meaning of St. 1909, c. 490, part IV, §1, as amended by St. 1912, c. 678, and that accordingly said property is subject to a legacy and succession tax as provided in said statute.

LOYED E. CHAMBERLAIN,
*Acting Judge of Probate Court.*

A true copy.
Attest:
N. H. PHILBRICK,
*Asst. Register.*

Filed Aug. 1, 1916.

*Claim of Appeal.*

To the Honorable the Judges of the Probate Court in and for the County of Middlesex:

Represents Richard H. Dana of Cambridge in the County of Middlesex, that he is a legatee and devisee under the will of Edith L. Dana, late of Cambridge in the County of Middlesex, deceased, and is interested in the estate of said deceased; that he is aggrieved by a decree of the Probate Court held at Cambridge in said County
29 of Middlesex, on the twenty-fifth day of July, A. D. 1916, whereby said Court held that certain property described in said decree is property within the jurisdiction of the Commonwealth belonging to an inhabitant of the Commonwealth and is subject to a legacy and succession tax.

And he hereby give- notice that he claims an appeal from said decree to the Supreme Judicial Court.

Dated this 25th day of July, A. D. 1916.

RICHARD H. DANA,
By His Attorney, HOLLIS R. BAILEY.

Filed July 25, 1916.

A true copy.
Attest,
—— ——, *Register.*

Filed August 1, 1916.

30 The foregoing appeal was entered in our said Court on the first day of August, A. D. 1916, and the appellant, Richard H. Dana, appeared in his individual capacity by Hollis R. Bailey, Esquire, his attorney, and filed the following statement of objections to decree appealed from, to wit:

COMMONWEALTH OF MASSACHUSETTS,
*Middlesex, ss:*

Supreme Judicial Court.

RICHARD H. DANA, Executor, Petitioner,

vs.

RICHARD H. DANA, Individually, Appellant.

*Appellant's Statement of Objections to Decree Appealed From.*

Richard H. Dana, individually, appellant, objects to the decree appealed from upon the following grounds, to wit:—

1. Because the true construction of the statute cited in said decree, viz.: St. 1909, c. 490, Part IV, sec. 1, as amended by St. 1912, c. 678, is not as stated in said decree but is entirely otherwise.

2. Because according to the true construction of said statute as amended the property mentioned in said decree, to wit:—

Interest under Duluth and Gladstone Real Estate Trust,
30 Preferred shares Amoskeag Manufacturing Company,
45 common shares Amoskeag Manufacturing Company,
130 shares Boston Ground Rent Trust,

31 is not subject to a legacy and succession or so-called inheritance tax in Massachusetts.

3. Because said property mentioned in said decree consists either wholly or mainly of equitable interests in real estate situated outside of Massachusetts and is governed by the law applicable to such real estate and accordingly is not subject to a legacy and succession or so-called inheritance tax in Massachusetts.

4. Because the imposing and levying of an inheritance, legacy or succession tax in Massachusetts upon said property or upon the appellant on account of the same or by reason of his acquisition thereof is in violation of Article IV, Section I, Chapter I, Part the Second, of the Constitution of Massachusetts, since it is the exaction of a duty or excise which is unreasonable being upon a commodity or commodities not within the Commonwealth of Massachusetts and also being plainly and grossly oppressive and contrary to common right.

5. Because the imposing and levying of an inheritance, legacy or succession tax in Massachusetts upon said property or upon the appellant on account of the same is in violation of the XIV Amendment of the Constitution of the United States since it deprives the appellant of his property without due process of law.

6. Because said decree in all respects is contrary to law.

RICHARD H. DANA,
By His Attorney, HOLLIS R. BAILEY.

32 And the Treasurer and Receiver General appeared by Henry C. Attwill, Esquire, Attorney-General, and William Harold Hitchcock, Assistant Attorney-General, and the said Richard H. Dana, Executor, petitioner, by Elliott B. Church, Esquire, his attorney. And the cause coming on to be heard by our said Court, was, at the request of the parties, reserved by the Justice who presided at the hearing, for the consideration and determination of the full Court, in the following words, to wit:

*Reservation.*

The above entitled case came on for hearing before me for a final decree upon the bill for instructions filed by the plaintiff as executor, the answers thereto, the decree of the Probate Court, the appeal therefrom and the objections of the appellant to said decree and thereupon at the request of the parties the case is reserved for the determination of the full Court.

JOHN C. CROSBY, *J. S. J. C.*

Filed August 1, 1916.

And thereupon the cause was entered in the Supreme Judicial Court for the Commonwealth. Afterwards, to wit, on the twenty-ninth day of June, nineteen hundred and seventeen, the following rescript was received from the Supreme Judicial Court for the Commonwealth, as follows, viz:

33 *Rescript from Supreme Judicial Court for the Commonwealth.*

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, June 29, 1917.

In the case of Richard H. Dana, Executor, vs. Treasurer & Receiver General et al., pending in the Supreme Judicial Court for the County of Middlesex,

Ordered, that the clerk of said Court in said county make the following entry under said case in the docket of said court, viz:

Decree of Probate Court reversed. Petition to stand for hearing to determine whether the tax laid on the interest of deceased in the Duluth and Gladstone Real Estate Trust was imposed upon (1) her interest by way of a lien for the payment of $9033 or (2) upon her interest as owner of an undivided quarter beneficial interest in the Duluth land or (3) upon both. If it was imposed upon the first only it is valid, otherwise not.

By the Court.

C. H. COOPER, *Clerk.*

(Opinion herewith.)

34 And on the twenty-third day of July, nineteen hundred and seventeen, the following final decree, in accordance with said rescript, was entered by your said Court, to wit:

*Final Decree.*

The above entitled case came on to be further heard after a rescript from the Full Court and thereupon on consideration thereof it is hereby ordered, adjudged and decreed that the decree of the Probate Court for Middlesex County appealed from, being decree entered July 25, 1916, be, and the same hereby is, affirmed except as to so much of the same as relates to the interest under Duluth and Gladstone Real Estate Trust, and as to that portion of said decree the appeal is sustained and said portion is reversed and said interest is declared not to be subject to a legacy and succession tax.

By the Court sitting in Boston.

JOHN H. FLYNN,
*Asst. Clerk.*

35 COMMONWEALTH OF MASSACHUSETTS,
*Middlesex, ss:*

Supreme Judicial Court.

In Equity. No. 1939.

RICHARD H. DANA, Executor,

vs.

CHARLES L. BURRILL, Treasurer and Receiver General, and RICHARD H. DANA, Individually.

*Petition of Richard H. Dana Individually for a Writ of Error.*

And now comes Richard H. Dana Individually, one of the respondents in the above entitled case, and says that on the 23rd day of July, 1917, the Supreme Judicial Court within and for the County of Middlesex in the Commonwealth of Massachusetts, being the highest court of law or equity of Massachusetts in which judgment could be rendered in said action, entered in said case a final decree largely in favor of the above named Treasurer and Receiver General and against your petitioner Richard H. Dana Individually, in which decree and the proceedings had prior thereto in said suit certain errors were committed to the prejudice of the above named Richard H. Dana Individually by which errors he is deprived of his property without due process of law in violation of the XIV Amend-
36 ment to the Constitution of the United States, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the said Richard H. Dana Individually prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said decree so far as it is adverse to the said Richard H. Dana Individually may be reversed, and that a transcript of the record, proceedings and papers in this suit, duly authenticated,

may be sent to the Supreme Court of the United States and an order made fixing the amount of the bond to be filed by him.

RICHARD H. DANA,
INDIVIDUALLY,
By His Solicitor and Counsel, HOLLIS R. BAILEY.

Writ of error allowed upon the execution of a bond by the above-named petitioner Richard H. Dana Individually to the original plaintiff Richard H. Dana Executor and to the Treasurer and Receiver General of the Commonwealth of Massachusetts in the sum of two hundred dollars.

August 15, 1917.

ARTHUR P. RUGG,
*Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.*

37 UNITED STATES OF AMERICA:

Supreme Court of the United States, October Term.

RICHARD H. DANA, Individually, Plaintiff in Error,

vs.

RICHARD H. DANA, Executor, and CHARLES L. BURRILL, Treasurer and Receiver General, Defendants in Error.

*Assignment of Errors.*

And now comes Richard H. Dana Individually, now plaintiff in error, and with his petition for a writ of error makes and files the following assignment of errors and says that there are manifest errors in the records and proceedings in the above entitled case and in the final decree of the Supreme Judicial Court within and for the County of Middlesex in the Commonwealth of Massachusetts entered therein July 23, 1917. The said errors are more particularly set forth as follows:

1. Said Court erred in erroneously affirming that part of the decree of the Probate Court for Middlesex County entered July 25, 1916, which held that the 30 preferred shares and the 45 common shares of the trust known as the Amoskeag Manufacturing Company,
38 and the 130 shares of the trust known as the Boston Ground Rent Trust all owned by the testatrix, Edith L. Dana, at the time of her decease, were subject to a legacy and succession tax in Massachusetts as being property within the jurisdiction of the Commonwealth of Massachusetts belonging to an inhabitant of said Commonwealth; the fact being that said shares constituted an equitable interest in real estate situated outside of the Commonwealth of Massachusetts and accordingly outside the jurisdiction of the Commonwealth of Massachusetts and beyond its taxing power.

2. Said court erred in erroneously imposing a succession tax in Massachusetts upon or on account of said shares in violation of the

provisions of the XIV Amendment of the Constitution of the United States, thereby depriving the plaintiff in error of his property without due process of law.

3. Said court erred in erroneously holding and deciding that the real estate owned by the trust known as the Amoskeag Manufacturing Company situated in New Hampshire under the doctrine of equitable conversion was converted into personalty from the beginning of said trust known as the Amoskeag Manufacturing Company in 1911; the fact being that said real estate remained real estate and was real estate when Edith L. Dana died July 21, 1915.

4. Said Court erred in erroneously holding and deciding that the real estate owned by the Boston Ground Rent Trust situated entirely outside of Massachusetts under the doctrine of equitable conversion was converted into personalty from the time it was
39 acquired by said Boston Ground Rent Trust prior to the death of Edith L. Dana, July 21, 1915; the fact being that said real estate remained real estate and was real estate when Edith L. Dana died July 21, 1915.

For which errors the plaintiff in error, Richard H. Dana Individually, prays that so much of the decree of said Supreme Judicial Court dated July 23, 1917, as is adverse to him may be reversed and a decree entered entirely in his favor and for costs.

RICHARD H. DANA, INDIVIDUALLY,
By His Solicitor and Counsel, HOLLIS R. BAILY.

40 COMMONWEALTH OF MASSACHUSETTS:

Boston, September 13, 1917.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Richard H. Dana, executor vs. Treasurer & Receiver General et al. decided on the 29th day of June, 1917.

HENRY WALTON SWIFT,
*Reporter of Decisions.*

41 RICHARD H. DANA, EXOR.,

v.

TREAS. & RECEIVER GENERAL & RICHARD H. DANA.

LORING, *J.*:

Edith L. Dana died domiciled in Massachusetts and possessed of 75 shares in the Amoskeag Manufacturing Company, 130 shares in the Boston Ground Rent Trust, and an "interest under the Duluth & Gladstone Real Estate Trust." A succession duty was imposed upon each of these pieces of property. Mrs. Dana's husband the sole residuary devisee and legatee under her will made the claim that the three pieces of property in question or "so much of" them as consists of an equitable interest in real estate situate outside the territorial limits of the state were not the subject of a succession duty in

this Commonwealth. Thereupon the executor brought a bill for instructions in the Probate Court making the Treasurer and Receiver General and Mrs. Dana's husband the parties defendant. The Probate Court decided that said property was subject to a succession duty. From that decree Mr. Dana took the appeal which is now before us.

Mr. Dana's contention is that an equitable estate in land lying outside of the Commonwealth although owned by one domiciled in the Commonwealth at the date of his death is not subject to a succession duty here. There is no question of the correctness of that proposition. See for example Attorney General v. Barney, 211 Mass. 134. Walker v. Treas. & Recvr. Genl., 221 Mass. 600. The question which we have to decide is how far that principle of law is applicable in this case.

1. We take up first Mrs. Dana's shares in the Amoskeag Manufacturing Company. The Amoskeag Manufacturing Com-
42 pany was the name by which the trustees under a declaration of trust were to be known in their collective capacity as matter of convenience in the practical conduct of the business carried on by them under that declaration of trust. The trust was created to take over the factory and manufacturing business theretofore owned and carried on by a New Hampshire corporation known as the Amoskeag Manufacturing Company. The factory in question and the tangible personal property held under the trust are situate in the State of New Hampshire. "The beneficial interest in this trust" is divided into shares. These shares are represented by transferable certificates. It is provided in the declaration of trust that the death of a shareholder shall not operate to determine the trust nor entitle the legal representatives of a deceased shareholder to an accounting, but that the executors, administrators and assigns of the deceased shareholder shall succeed to the rights of the decedent and be entitled to a certificate in their own names upon surrender of the old certificate. It is also provided therein that the ownership of shares hereunder shall not entitle the shareholder to any title in or to the trust property or right to call for partition or division of the same, or for an accounting. The declaration of trust provides for meetings of the shareholders and at these meetings the shareholders shall have power to elect the trustees and to alter and amend the declaration of trust. It is further provided therein that on the expiration of twenty-one years after the death of certain persons therein named the trustees shall wind up the affairs of the trust, liquidate its assets and distribute the same among the holders of shares. There is a provision in it whereby the time for winding up its affairs can be
43 shortened or extended by the shareholders at shareholders' meetings. In addition there is a provision which authorizes the trustees in case they elect so to do "to distribute the shares, securities or obligations instead of cash" in case of the liquidation of the assets of the trust. But there is no provision authorizing them to distribute among the shareholders the real property then owned by the trust.

This declaration of trust created a partnership. Upon that point

Phillips v. Blatchford, 137 Mass. 510 is decisive. In addition the trust is well within the distinction between trusts which create partnerships and trusts which are pure trusts, stated at length in Williams v. Milton 215 Mass. 1, where the cases are collected. For the last case in which this distinction was applied and the trust held to have created a partnership see Frost v. Thompson, 219 Mass. 360.

It is alleged in the petition and admitted by the answer that at the date of Mrs. Dana's death over 75 per cent of the property of the Amoskeag Manufacturing Company consisted of real estate situate in New Hampshire and 23 per cent of it "consisted of tangible personal property in New Hampshire in the shape of raw material and goods finished and in process of manufacture." The other 2 per cent seems to have been made up of intangible personalty.

It is the contention of the appellant that a person dying possessed of one of the shares of this trust dies possessed of real estate to the extent to which the assets of the trust at the time of the decedent's death consist of real estate and of personal property to the extent to which those assets consist of personal property at that time. And we see no escape from that result if the rule as to partnership real estate which obtains in this Commonwealth in case of ordinary partnerships applies to a partnership like the Amoskeag Manufacturing Company.

44 In case of an ordinary partnership there is no practical difficulty in carrying out the Massachusetts rule as to partnership real estate, namely, that so far as necessary to pay the debts of the firm partnership real estate is personalty but that for all other purposes it is real property. In an ordinary case a partnership comes to an end upon the death of each partner and by reason of that fact the partnership affairs have to be wound up at that time. In such a case there is no practical difficulty in winding up the estate of the decedent partner under the Massachusetts rule as to partnership real estate. But the same rule applied to partnership real estate in a partnership like the Amoskeag Manufacturing Company partnership would raise great practical difficulties. Take the case of a person who dies owning one share in the Amoskeag Manufacturing Company partnership. If the Massachusetts rule as to partnership real estate applies that one share (as we have said already) is real estate to an amount determined by ascertaining the proportion of the real estate owned by the partnership to all its assets and is personal property to the amount determined by ascertaining the proportion between its personal property and those assets. If that be so that one share must be dealt with accordingly in winding up the estate of the decedent; that is to say, so far as that one share is real estate it cannot be sold without a license from the Probate Court to sell it as real estate although so far as it is personal property it can be sold by the executor or administrator by virtue of his office. Wilcox v. Wilcox, 13 Allen, 252, is the case in which the rule as to partnership real estate in case of ordinary partnerships was finally established in this Commonwealth. It was

pointed out in that case (at p. 254) that: "upon examination of the earlier English cases, from which this doctrine [the English
45 doctrine that in case of partnership real estate there is an out and out conversion of it into personal property for all purposes] has grown, it will be found that, in several of them, there was an express agreement between the co-partners, the specific performance of which would of itself convert the real estate into personal assets. The conversion was worked, therefore, not merely from the relation of co-partnership, but on the ground that the deceased partner had, by the very contract under which he became joint owner, stamped upon the realty the character and incidents of personalty." From an examination of the authorities before the court in Wilcox v. Wilcox, it is plain that one of the cases thus referred to was Ripley v. Waterworth, 7 Vesey, 425. The agreement in Ripley v. Waterworth was an agreement that on the conclusion of the partnership all the partnership property should be sold and reduced to cash. That is to say the agreement which it was held in at least one of the early cases referred to in Wilcox v. Wilcox, to work an out and out conversion was an agreement of the same kind as the agreement in the case of Amoskeag Manufacturing Company partnership. Since the decision in Ripley v. Waterworth it has been held and is now established in England (for reasons based on practical considerations) that partnership realty is converted out and out to personalty in the absence of an agreement and that this conversion dates from the beginning of the partnership. For this reason no late cases bearing on the case at bar are to be found there. It was not necessary in Ripley v. Waterworth to decide the time from which the real estate was converted into personalty by force of this agreement. That point however is covered (so far as the case now before us is concerned) by the decision in Fletcher v. Ashburner, 1 Bro. C. C. 497. In that case a testator devised his real and personal property to trustees
46 to permit his widow to enjoy the residue during her life and after her decease to sell the same and distribute the proceeds between his son and his daughter or in case his widow should marry again then and in that case to sell all the estate and effects given her for life and to divide the proceeds between his wife, his son and his daughter share and share alike; and in case either the son or the daughter should die before his or her legacy should become due, the share or legacy of him or her so dying was to go to the survivor. The son survived the daughter. Both died during the lifetime of the widow. Upon the death of the widow it was held that the property went to the next of kin of the son and not to his heirs. This conclusion was reached on the ground that the testator had in effect provided that his real and personal property should be one fund from the beginning. It was decided in terms in Fletcher v. Ashburner, that the gift to the son and daughter vested at the date of the death of the testator subject to each being divested by the gift to the survivor in case of the death of the legatee in question before the legacy came into possession. That is to say it was held that the fund was personal property at the date of

the death of the son which took place during the life of the widow and so before the sale was to take place which in fact made the real property personalty. And it is plain that on principle this is correct. Where real property is held to be converted into personalty because with personal property it is made one fund and all the fund is ultimately to be personalty it cannot be one fund from the beginning unless the conversion takes place from the beginning. In the declaration of trust creating the Amoskeag Manufacturing Company partnership it is provided that upon the termination of the trust all the partnership real estate shall be converted into personalty and it is provided that throughout the life
47 of the partnership the beneficial interest in it shall be represented by transferable certificates; in this way it is provided that the property of the trust partnership shall constitute one fund. It follows that the conversion into personalty must be taken to date from the beginning to make the fund one fund from the beginning.

It follows that the shares of the Amoskeag Manufacturing Company partnership owned by Mrs. Dana at the time of her death were personal property and passed to her executor by virtue of the laws of this Commonwealth because of her domicile in this state at that time. If they were personal property a succession duty was rightly imposed upon them.

The appellant contends that this conclusion is in conflict with the decisions of this court in Kinney v. Treasurer & Receiver General 207 Mass. 368, so far as that non-resident decedent's interest in so much of the Cambridge Real Estate Associates as was personal property was concerned, and with the decision in Peabody v. Treasurer and Receiver General, 215 Mass. 129.

In Kinney v. Treasurer & Receiver General, a succession tax was levied upon the interest of a non-resident in a mortgage on real estate lying within the Commonwealth securing a note owned by the non-resident and also upon his interest in the Cambridge Real Estate Associates represented by a deposit book of the owner pledged with the non-resident decedent to secure the owner's note. A succession duty upon the interest of the decedent in the mortgage of real estate situate within the Commonwealth was supported on the ground that a mortgage in Massachusetts conveys the legal title to the mortgagee and for that reason the mortgagee had an interest in the real estate within the Commonwealth. The succession duty imposed upon the interest of the decedent in the Cambridge Real Estate Associates (which he got by being the pledgee of the deposit book of the owner) was supported on the same
48 ground. It was assumed in the opinion in that case that all the property of the Cambridge Real Estate Associates was real estate. It appears from the report of that case however that although the great bulk of it was real estate yet the Associates in fact owned two shares in the Calumet & Hecla Mining Company. And it is on the decision made in Kinney v. Treas. & Recvr. Genl. so far as the non-resident decedent's interest in those two shares of mining stock is concerned that the appellant now relies. The existence of these two shares of personal property was not referred to

in the opinion. The opinion proceeded on the ground that a hypothecation of an equitable interest in real estate stood on the same footing as a legal mortgage of real estate. That is all that the court undertook to decide in that case and all that that case can be taken to stand for as an authority. So far as the non-resident's interest in the two shares of mining stock (the existence of which was ignored by the court) was concerned the case was in fact rightly decided because it appears from the record in that case that the trustees of the Cambridge Real Estate Associates and all of them were residents of Massachusetts and that all its property real and personal was in Massachusetts. That being so a succession tax was rightly imposed upon the interest of the non-resident pledgee of the deposit book so far as the pledge of the deposit book was a pledge of personalty under the decision made in Bliss v. Bliss, 221 Mass. 201, as to registered bonds of the Commonwealth held by non-residents. The decision in Peabody v. Treasurer & Receiver General, 215 Mass. 129 may well rest upon the same ground. It is to be noted that in Kennedy v. Hodges, 215 Mass. 112, 114, this is put forward (in effect) as the ground on which these decisions might well be taken to rest.

49 The Attorney General has placed much reliance upon the decision in Kennedy v. Hodges, ubi supra, so far as the decision in that case concerned certificates for shares in the Western Real Estate Trust. The character of the property owned by that Trust was not stated in the record. It was alleged in the bill and admitted in the answer that the shares were personal property.

We are of opinion that the succession duty imposed upon Mrs. Dana's shares in the Amoskeag Manufacturing Company was valid.

2. We are of opinion that the same conclusion must be reached with respect to the succession duty imposed upon the 130 shares in the Boston Ground Rent Trust held by Mrs. Dana at the date of her death.

At the date of Mrs. Dana's death 85 per cent of the property of that trust consisted of real estate situated outside of Massachusetts. On the allegations contained in the petition and admitted by the answer it must be taken that the balance or fifteen per cent consisted of personal property. The beneficial interest in this trust was divided into shares and for these shares transferable certificates were issued by the trustees. The declaration of trust provided for meetings of the shareholders at which they might instruct the trustees in any manner not inconsistent with the declaration of trust and at which the declaration of trust might be altered or added to accordingly. It further provided that at a time fixed in the trust "or at such earlier time as three quarters in value of the shareholders should direct" the trustees should terminate the trust by selling all property then held by them and dividing the proceeds among the shareholders. The principal difference between the Ground Rent Trust and the Amoskeag Manufacturing Company is that the personal property (amounting to fifteen per cent of all the property of the trust at Mrs. Dana's death) did not come into existence until after

50 the creation of the trust. It came into existence by virtue of a clause in the declaration of trust providing that the trustees might set aside not more than ten per cent of the annual income for a contingent fund or sinking fund or both. It appears therefore that the property of the Ground Rent Trust was ultimately to be reduced into personal property and that the trust property (in part real and in part personal property) was to be one. Under these circumstances we are of opinion that the same conclusion must be reached in this trust as in the Amoskeag Manufacturing Company. It follows that the succession duty imposed on the 130 shares in the Boston Ground Rent Trust was properly imposed upon them as personal property held by a person domiciled in this Commonwealth at the date of her death.

The conclusion which we have reached as to Mrs. Dana's interest in the Boston Ground Rent Trust seems to be in conflict with the conclusion reached in Bartlett v. Gill, 221 Fed. 476, as to the character of shares in City Associates, Commonwealth Land Trust, Boston Real Estate Trust, Bedford Building Association and the Municipal Real Estate Trust. It does not affirmatively appear that personal property as well as real estate was held by the trustees of those trusts. But it was assumed in Bartlett v. Gill, that that might have been the case. We have examined the authorities cited in Bartlett v. Gill and find nothing in them inconsistent with the conclusion which we have reached; so far as the decision in that case is in conflict with the conclusion here reached we are of opinion after giving due consideration to it that it ought not to be followed. Beal v. Carpenter, 235 Fed. R. 273, is the only other case which has come to our attention in which these matters are discussed.

3. The "interest" or speaking more accurately the interests of the decedent in the Duluth & Gladstone real estate trust are quite different.

51 Without going into details we are of opinion that by the true construction of that trust the decedent had interests in it of two kinds. The property of that trust consisted of real estate and real estate alone. The persons interested in the trust were Mrs. Dana (the decedent), Mr. Dana (her husband) and a Mr. Hale. The real estate consisted of one parcel of land in Duluth in the State of Minnesota and one parcel of land in Gladstone in the State of Michigan. We are of opinion that by the true construction of the declaration of trust the decedent and her husband each owned one undivided equitable quarter interest in the Duluth Real Estate and that Mr. Hale owned the other two quarters undivided equitable interest in that part of the trust realty (i. e. in the Duluth land) subject to a lien on his (Mr. Hale's) two quarters held by the decedent to secure the payment to her of the sum of $9033. The beneficial interest in the Gladstone real estate was all owned by Mr. Hale, but it was subject (1) to a lien for the payment to Mr. Dana of $2500 and (2) to a lien in favor of the decedent for payment of the same $9033, for which she had a lien upon Mr. Hale's undivided beneficial interest in the land in Duluth.

There was no provision in the declaration of trust for meetings

of the owners of the beneficial interests in this trust property. The owners of the beneficial interest had a common interest but they were not associated together in any way. As we have already said there was no personal property held by the trustee and there was no provision for the issue of certificates to represent the shares to those who held the beneficial interests in the trust. There was a provision putting restrictions upon the assignment of their interests by the owners of the beneficial property but that is the only provision of the declaration of trust in this connection. It was provided that the real estate remaining unsold at the end of twenty years should be sold and the proceeds divided as stated above. As there
52 was a provision directing that all real estate should be sold at the end of the trust there was a provision for a conversion of the real estate into personal property. But in such a case no conversion takes place until the date when the sale is directed to be made and at Mrs. Dana's death her interest as a holder of one undivided fourth of the land in Duluth was an interest in real estate outside the Commonwealth and so not subject to a tax in Massachusetts. This is plain: see for example Atty. Genl. v. Barney, ubi supra and Walker v. Treasurer and Receiver General, ubi supra.

But Mrs. Dana's interest created by this declaration of trust which secured to her the payment of $9033, by a pledge of Mr. Hale's beneficial interest to the extent of one-half of the land in Duluth and his beneficial interest in the whole of the land in Gladstone was subject to a succession tax in Massachusetts. This interest was of the same kind as the interest of the holder of a note secured by mortgage on land lying outside the Commonwealth. In both cases the debt is personal property; it passes by succession to her executor or administrator by force of the laws of Massachusetts and so is subject to a succession duty here.

The Attorney General has contended that the undivided fourth interest of Mrs. Dana is personal property because it is impliedly provided that it shall pass by assignment: The exact provisions of the declaration of trust are given below:* And he has made the same contention with respect to Mrs. Dana's interests in Amoskeag Manufacturing Company and in the Boston Ground Rent Trust. This contention is not material in connection with the Amoskeag Manufacturing Company and the Boston Ground Rent Trust because we have reached the conclusion that Mrs. Dana's interest in
53 those trusts was personal property on other grounds. The argument of the Attorney General is that a beneficial interest in real property can be conveyed by deed only. In other words that so far as the conveyance or transfer of the equitable ownership in real property is concerned the same rule applies as that which governs the conveyance of a legal title to land, and since it is pro-

*"No assignment of a subscriber's interest shall be made of less than one-half his original interest and not to more than one person, though more than one person may take under a will or as a distributee. Any assignment to be valid must be in duplicate, each countersigned by the trustee and one preserved by him. On any new assignment of the same interest the old one must be delivered to the trustee to be cancelled to the amount of the interest assigned."

vided (at least impliedly) that these equitable interests can be assigned without a deed it is provided that they are personalty. But although support for that contention is to be found in Bart-
54 lett v. Gill, ubi supra, at p. 495, it is without foundation. Conveyances of legal estates are the outcome of feudal tenures and are founded on the doctrine of feof-ment with livery of seisin. The transfer of an equitable interest in real estate has nothing to do with feudal tenures and is not dependent on the doctrine of feof-ment with livery of seisin. The only provision of law regulating the transfer of an equitable estate in land is the 3rd section of Statute of Frauds (St. 29 Car. II, c. 3) re-enacted at the present time in this Commonwealth in R. L. c. 127, s. 3, and that provision is that the assignment must be in writing. In other words the method of transfer adopted (i. e. by an assignment in writing) is as applicable to a transfer of an equitable estate in land as it is to a transfer of personal property. Another contention of the Attorney General is that Mrs. Dana's interest as owner of one undivided fourth part of the Duluth real estate is subject to a succession tax in this Commonwealth because the sole trustee was and is a resident of this Commonwealth and he contends for that reason that a succession duty upon that interest comes within the decision made in Bliss v. Bliss, ubi supra as to registered bonds of the Commonwealth. We do not need to decide whether that contention would have been correct had nothing more appeared in the case. But more does appear; it is alleged in the petition that: "said interest (Mrs. Dana's) under the Duluth & Gladstone Real Estate Trust consists of an equitable interest in real estate situated entirely outside of Massachusetts in the States of Minnesota and Michigan. It is the law of each of said states that the trust is to be enforced as to the real estate in each of those states by the courts in those states respectively without recourse to the laws or the courts of Massachusetts." This allegation was admitted by the Attorney General in his answer. Whether the statutes of Minnesota and Michigan do or do not provide for an enforcement of a trust with respect to real estate
55 situate within their territorial limits when the trustee resides out of the State are questions of fact. Counsel for Mr. Dana has contended that the allegations set forth above are allegations of the existence of such statutes and we are of opinion that in this contention he is right. It follows that on the record it must be taken to be the fact that without resorting to the courts of this Commonwealth Mrs. Dana and her successor in title could have asserted their rights as owners of one undivided fourth part in the beneficial property in the Duluth real estate, and this interest does not come within the decision in Bliss v. Bliss, ubi supra.

It may be noted in passing that the case at bar in this connection is not like Kinney v. Treasurer and Receiver General, ubi supra, and Peabody v. Treasurer and Receiver General, ubi supra. In those cases all the trust property real and personal as well as the trustees was within the Commonwealth of Massachusetts.

It must be taken on the record that the succession duty imposed upon Mrs. Dana's "interest under the Duluth and Gladstone Real

Estate Trust" was imposed upon all the interests which she had under that trust. That is to say, both upon her interest as the holder of a debt secured by pledge of Mr. Hale's equitable interest under the trust and as holder of an undivided equitable fee in that portion of the trust property which consisted of land in Duluth. So far as the latter is concerned the property was not subject to a succession tax. To that extent the decree of the Probate Court was wrong; so far as the former is concerned it is right.

It does not appear whether the succession duty imposed upon Mrs. Dana's "interest under the Duluth and Gladstone Real Estate Trust" was imposed on her interest by way of a lien for the payment of the $9033 or upon her interest as owner of an undivided quarter
56 beneficial fee in the land in Duluth or on both. It follows that the decree of the Probate Court was wrong so far as it declared that the succession duty imposed upon Mrs. Dana's "interest under the Duluth and Gladstone Real Estate Trust" was valid.

It is alleged in the petition that the rate of duty depends upon the duties imposed upon all the three pieces of property being valid. It follows that the whole decree must be reversed and the case stand for hearing before a single justice. It is so ordered.

57 [Endorsed:] Dana vs. Treas. & Rec. Gen. Certified Copy of the Opinion of the Supreme Judicial Court.

58 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof, we have caused the seal of our said Supreme Judicial Court to be hereunto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Cambridge, this fourteenth day of September in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] WM. C. DILLINGHAM, *Clerk.*

59 Know all men by these presents, That we, Richard H. Dana, Individually, of Cambridge in the County of Middlesex and Commonwealth of Massachusetts, plaintiff in error as principal and the Fidelity and Deposit Company of Maryland, a duly established corporation having a usual place of business in Boston, Massachusetts, as surety, are held and firmly bound unto Richard H. Dana, Executor of the will of Edith L. Dana, and Charles L. Burrill, Treasurer and Receiver General of the Commonwealth in the full and just sum of Two Hundred Dollars to be paid to the said Richard H. Dana, Executor, and Charles L. Burrill, Treasurer and Receiver General of the Commonwealth their certain Attorney, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, successors and assigns, jointly and severally, by these Presents.

Sealed with our seals, and dated the eleventh day of August in the year of our Lord one thousand nine hundred and seventeen.

Whereas lately at a sitting of the Supreme Judicial Court within and for the County of Middlesex and Commonwealth of Massachusetts in a suit in equity depending in said Court between Richard H. Dana, Executor of the will of Edith L. Dana, Plaintiff, and Charles L. Burrill, Treasurer and Receiver General of the Commonwealth and Richard H. Dana, Individually, defendants, judgment was rendered in part against the said Richard H. Dana Individually
60 and the said Richard H. Dana Individually having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard H. Dana, Executor of the will of Edith L. Dana, and the said Charles L. Burrill, Treasurer and Receiver General, citing and admonishing them to be and appear in the Supreme Court of the United States at Washington on the fourteenth day of September next.

Now the condition of the above obligation is such, that if the said Richard H. Dana Individually shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

RICHARD H. DANA. [SEAL.]
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
By ARTHUR L. TASH, [CORP. SEAL.]
*Resident Vice-President.*

Attest:
JOHN H. LANDER,
*Resident Assistant Secretary.*

Signed, sealed and delivered in presence of
RUTH C. JOHNSON,
To R. H. D.

August 15, 1917.

Approved:
ARTHUR P. RUGG,
*Chief Justice of Supreme Judicial Court of Massachusetts.*

A true copy of said bond.
Attest:
WM. C. DILLINGHAM, *Clerk.*

61 UNITED STATES OF AMERICA:

Supreme Court of the United States, October Term.

RICHARD H. DANA, Individually, Plaintiff in Error,

vs.

RICHARD H. DANA, Executor, and CHARLES L. BURRILL, Treasurer and Receiver General, et al., Defendants in Error.

*Order for Enlargement of Time for Docketing Case and Filing Record.*

For good cause shown, It is ordered that the time for docketing this case and filing the record thereof with the Clerk of the United States Supreme Court be enlarged to and including Saturday, September 22, 1917.

ARTHUR P. RUGG,
*Chief Justice, Supreme Judicial Court of the Commonwealth of Massachusetts.*

September 14, 1917.

Assented to:

WM. HAROLD HITCHCOCK,
*Asst. Atty. Gen.*

ELLIOTT B. CHURCH,
*Atty. for Richard H. Dana, Executor.*

Endorsed on cover: File No. 26,157. Massachusetts Supreme Judicial Court. Term No. 690. Richard H. Dana, individually, plaintiff in error, vs. Richard H. Dana, executor of the will of Edith L. Dana, and Charles L. Burrill, treasurer and receiver general of the Commonwealth of Massachusetts. Filed September 18th, 1917. File No. 26,157.

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Supreme Court of the United States

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No. 286

[redacted]

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Brief for Plaintiff in Error, [redacted]

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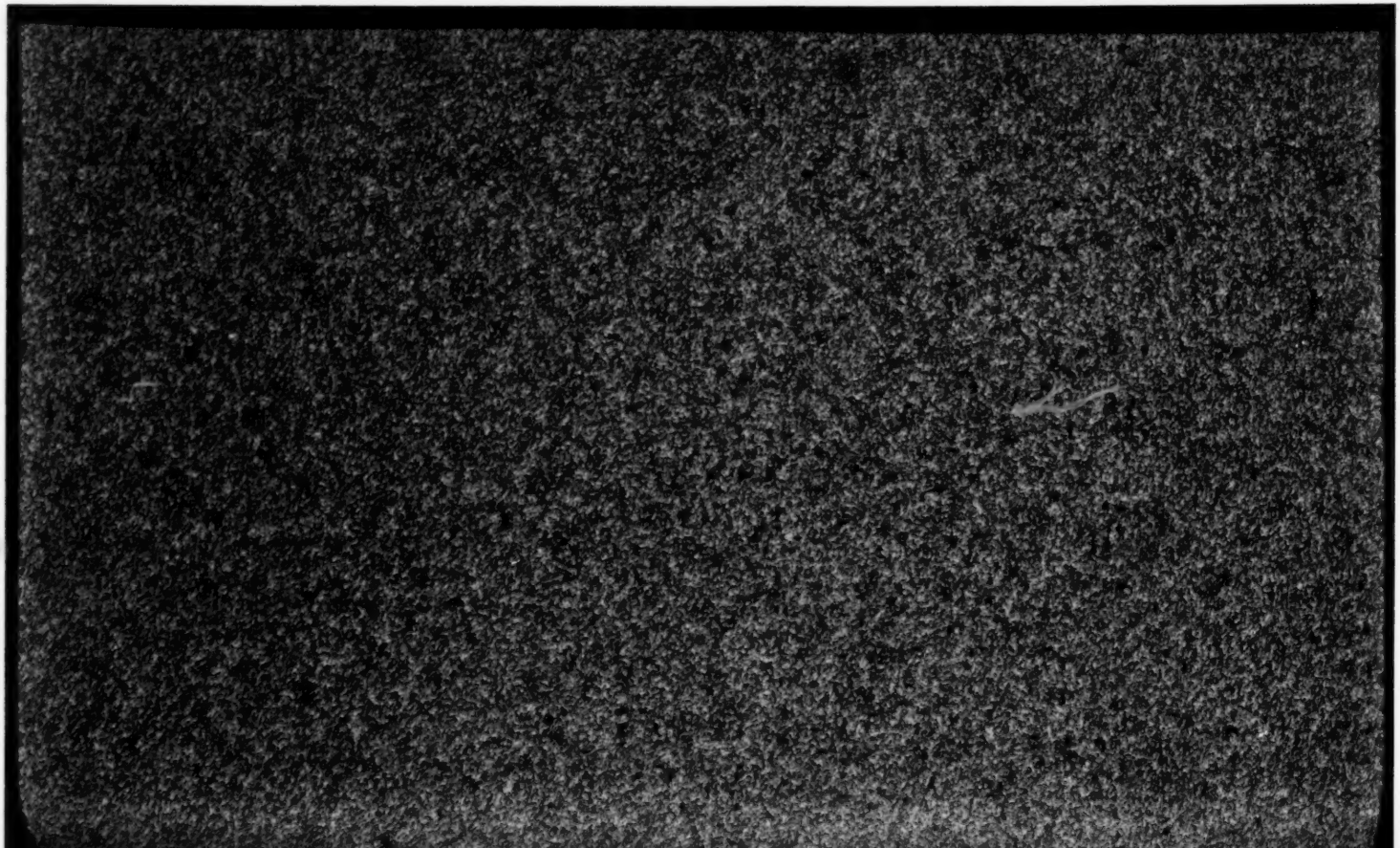

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# Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 276.

RICHARD H. DANA, Individually, *Plaintiff in Error,*

*v.*

RICHARD H. DANA, Executor of the Will of Edith L. Dana, and CHARLES L. BURRILL, Treasurer and Receiver General of the Commonwealth of Massachusetts.

## BRIEF FOR PLAINTIFF IN ERROR, RICHARD H. DANA.

### I.

### CONCISE STATEMENT OF CASE.

This is a suit to determine the validity of a succession tax assessed by the Commonwealth of Massachusetts on real estate situated outside of Massachusetts.

The interests in question were equitable interests represented by shares in two so-called real-estate trusts: one known as the Amoskeag Manufacturing Company and the other as the Boston Ground Rent Trust (Record, pp. 4, 5). It is admitted that the law of all the states in which said real estate is situated is such that the trust as to said real estate may be enforced by the courts of said states without resort to the laws or the courts of Massachusetts (Record, p. 5).

The Supreme Judicial Court in Massachusetts found that ordinarily an equitable interest in real estate is itself real estate, and also found that if the real estate is situated outside of Massachusetts, then the equitable interest is an interest in foreign real estate, and is not taxable in Massachusetts (Record, pp. 29, 34-37). This also appears by the final decree (Record, p. 26).

The court in Massachusetts was, however, of the opinion that the equitable interests in question, represented by shares in said real-estate trusts, did not come within the rule above stated, because the two real-estate trusts above named were, as the court held, partnerships, and not trusts. The court further held that the doctrine of equitable conversion applied to these partnerships, and accordingly held that their real estate must be treated as personal property, so that the equitable interests represented by the shares in question must be considered as equitable interests in personal property; and that as such they were within the taxing power of Massachusetts.

## II.

### Specification of Errors Relied On.

Only four errors are assigned. These are shown in record pages 27 and 28. They are all relied on. They may be summarized as follows:

The Supreme Judicial Court in Massachusetts erred in sustaining a succession tax imposed on or on account of real estate situated outside of Massachusetts, the assessment of such tax being in violation of XIV Amendment of the Constitution of the United States.

## III.

### Brief of the Argument.

### *A.*

### *Jurisdiction.*

The constitutional question now to be decided was carefully raised in the lower court. This appears by paragraph 12 of the petition (Record, p. 6) and by paragraph 5 of the objections to decree of Probate Court (Record, p. 24). The point was also carefully raised by the assignment of errors (Record, p. 27).

It is well settled that the taking of property of a resident under the guise of a tax on his property is in violation of the XIV Amendment of the Constitution of the United States, if the property is situated outside of the state.

*Union Transit Co.* v. *Kentucky*, 199 U.S. 194.
*Provident Savings Ass'n* v. *Kentucky*, 239 U.S. 112.
*Connell* v. *Crosby*, 210 Ill. 380.
*In re Swift*, 137 N.Y. 77.

### *B.*

### *Conflicting Views.*

The Federal Courts in Massachusetts, both the United States District Court and the United States Circuit Court of Appeals, in a case involving much the same questions as are now before this court, decided that there was no equitable conversion of the real estate then in question, and found that there was no valid tax upon shares representing an equitable interest in such real estate.

See *Bartlett* v. *Gill*, 221 Fed. Rep. 476.

The fact that the decision of the United States District Court in this case of *Bartlett* v. *Gill* had been affirmed by the United States Circuit Court of Appeals in *Gill* v. *Bartlett*, 224 Fed. Rep. 927, was overlooked by the Supreme Judicial Court in Massachusetts (see Record, p. 34).

In *Bartlett* v. *Gill* the question was under the United States War Revenue Act of June 13, 1898, c. 448, sec. 29 (30 Stat. 464), and was whether certain shares in so-called real-estate trusts were real or personal property within the meaning of said Act, which imposed a succession tax only upon legacies or distributive shares arising from personal property. The wording of the statute was as follows:

> "That any person or persons having in charge or trust as administrators, executors or trustees any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein transferred by deed, grant, bargain, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer to any person or persons or to any body or bodies, politic or corporate, in trust or otherwise, shall be and hereby are made subject to a tax or duty to be paid to the United States as follows: . . . "

The question involved in *Bartlett* v. *Gill* under the aforesaid statute was clearly the same as the question involved under the Massachusetts statute in the present case, viz., Were shares in real-estate trusts interests in real estate or interests in personal property?

The Supreme Judicial Court refused to follow the case of *Bartlett* v. *Gill*, and it now remains for this court to consider the conflicting opinions and decide which should prevail.

It will be noted that Mr. Justice Bingham, in *Bartlett* v. *Gill*, considered many of the points raised by Mr. Justice Loring in the opinion of the Massachusetts court and reached a different conclusion thereon.

## *C.*

### *Equitable Conversion.*

The ordinary rule in Massachusetts is that there is no equitable conversion in the case of partnership real estate.

*Wilcox* v. *Wilcox*, 13 Allen, 252.
*Shearer* v. *Shearer*, 98 Mass. 107.
*Harris* v. *Harris*, 153 Mass. 443.

This rule has prevailed so long in Massachusetts that it is fair to say that it has become a rule of property, and as such is entitled to great weight.

Crocker's Notes on Common Forms (5th ed.), p. 90.

The doctrine of equitable conversion is a very old one.

It rests upon the principle that equity will consider as done that which a person having authority has di-

rected shall be done or which the parties owning the property have positively agreed shall be done.

It is not sufficient to work an equitable conversion for the owner to simply authorize a conversion.

Conversion must be directed or required by an express command or agreement or a clear expression of intention.

*Bartlett* v. *Gill*, 221 Fed. Rep. 476.

*D.*

*No Conversion Directed or Agreed Upon.*

In neither of the trust deeds now in question was a sale of the real estate ordered or required.

The most that can be said is that a sale was authorized if the trustees saw fit to make it. The trustees were authorized to sell real estate (Record, pp. 12, 19), but in certain cases their power was limited and a vote of a majority of the shareholders was made a prerequisite (Record, p. 12, par. 5, and p. 21), and in no case was a sale required if a sufficient number of the shareholders should request otherwise (Record, p. 17, art. V).

*Bartlett* v. *Gill*, 221 Fed. Rep. 476.

*E.*

*The Question of Equitable Conversion Depends upon the Law of the Situs.*

It is well settled that the question of whether an equitable conversion of real estate has taken place or not must be decided according to the law of the jurisdiction where the real estate is situated. In the present case all the real estate in question was situated out-

side of Massachusetts, and consequently the law of Massachusetts does not govern.

*Clarke* v. *Clarke*, 178 U.S. 186.

This point was overlooked by the Supreme Judicial Court of Massachusetts.

See *Guarantee Trust &c. Co.* v. *Maxwell*, 30 Atl. Rep. 339.
*Jenkins* v. *Guarantee &c. Co.*, 53 N.J. Eq. 194.

*F.*

*Foreign Law.*

The law of New Hampshire and of the other states in which the real estate in question was located as to equitable conversion and as to nature of partnership real estate is not stated in the record except inferentially. For all that appears this law may be quite different from the law of Massachusetts.

The rule of the state courts that in the absence of evidence the foreign law will be presumed to be the same as that of the forum may not apply here, especially as it is admitted (Record, pp. 5, 22) that it is the law of all the states in which the real estate is situated that the trust as to said real estate may be enforced by the courts of said states without resort to the laws or the courts of Massachusetts.

*G.*

*Power to Tax should Not Rest upon Basis of Equitable Conversion.*

As Mr. Justice ALDRICH well says in *Gill* v. *Bartlett*, 224 Fed. Rep. 927, it is not to be supposed that the

legislature intended to tax real estate under technical rules of equitable conversion. We give the substance of his statement and not his exact words.

## *H.*

### *Massachusetts Statutes.*

The Massachusetts statutes imposing a succession tax are as follows:

St. 1912, c. 678, sec. 1:

> "SECTION 1. Section one of chapter five hundred and sixty-three of the acts of the year nineteen hundred and seven, codified as section one of Part IV of chapter four hundred and ninety of the acts of the year nineteen hundred and nine, as amended by section one of chapter two hundred and sixty-eight and section one of chapter five hundred and twenty-seven of the acts of the year nineteen hundred and nine, is hereby further amended by striking out said section and inserting in place thereof the following:—*Section 1.* All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth, or any interest therein, belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, ex-

cept to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of this commonwealth exempt from taxation, or for or upon trust for any charitable purposes, to be carried out within this commonwealth, or to or for the use of a city or town within this commonwealth for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the adoptive parent or lineal ancestor of an adoptive parent, the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth, if its value does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of two per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of three per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars,

and to a tax of four per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class B shall be subject of a tax of two per cent of its value for the use of the commonwealth if such value does not exceed ten thousand dollars, to a tax of three per cent if its value exceeds ten thousand and does not exceed twenty-five thousand dollars, to a tax of five per cent if its value exceeds twenty-five thousand and does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child, adopted child, adoptive father or adoptive mother of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions. All taxes under this act shall be paid out of and chargeable to capital and not income, unless otherwise

provided in a will or codicil, but nothing herein contained shall affect any right of the commonwealth to collect such tax or lien therefor."

Amended by St. 1913, c. 498:

"SECTION 1. Section one of chapter six hundred and seventy-eight of the acts of the year nineteen hundred and twelve is hereby amended by inserting after the word 'codicil', in the third line from the end thereof, the words:—or deed or other instrument creating the grant or gift,—so that the last sentence of said section will read as follows:—All taxes under this act shall be paid out of and chargeable to capital and not income, unless otherwise provided in a will or codicil, or deed or other instrument creating the grant or gift, but nothing herein contained shall affect any right of the commonwealth to collect such tax or lien therefor."

The last-quoted statute seems to have no application to the present case, but is given so that we may have the exact wording of the entire section as it was July 21, 1915, the date when Edith L. Dana died.

For convenience of comparison we also give the statute relating to annual taxes.

St. 1909, c. 490, part I:

"SECTION 2. All property real and personal situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempted by law, shall be subject to taxation."

"SECTION 4. Personal estate for the purpose of taxation shall include:—

"First, Goods, chattels, money and effects, wherever they are; ships and vessels at home or abroad, except as provided in section seven.

"Second, Money at interest, and other debts due the person to be taxed more than he is indebted or pays interest for; but not including in such debts due him or indebtedness from him any loan on mortgage of real estate, taxable as real estate, except the excess of such loan above the assessed value of the mortgaged real estate.

"Third, Public stocks and securities, except as provided in clause Fifteenth of section five, bonds of railroads and street railways, stocks in turnpikes, bridges and moneyed corporations within or without this commonwealth, except as provided in section sixty-four of Part III.

"Fourth, The income from an annuity, and the excess above two thousand dollars of the income from a profession, trade or employment accruing to the person to be taxed during the year ending on the first day of May of the year in which the tax is assessed. Incomes derived from property subject to taxation shall not be taxed."

It is alleged in the bill and admitted by the answer that shares in so-called real-estate trusts holding real estate either within or without Massachusetts are not treated as subject to annual taxation (Record, pp. 5, 22).

## *I.*

### *Shares in Real-Estate Trusts Represent Equitable Interests in Real Estate.*

It is well settled that the holders of assignable certificates in so-called real-estate trusts like the beneficiaries under ordinary trusts have equitable interests in the property of the trust, and not merely choses in action.

*Peabody* v. *Treasurer & Receiver General,* 215 Mass. 129.
*Bartlett* v. *Gill,* 221 Fed. Rep. 481.

## *J.*

### *Equitable Interests in Real Estate are Real Estate.*

It is well settled that equitable interests in real estate are considered to be real estate.

*Croxall* v. *Shererd,* 5 Wall. 268, 281.
*Ould* v. *Washington Hospital,* 95 U.S. 303, 312.

It follows that legal and equitable interests in land have the same situs, viz., the situs of the land. The Massachusetts court concedes this as to the Duluth and Gladstone Real Estate Trust.

## *K.*

### *Inheritance Tax a Special Tax.*

An inheritance tax is a special tax, and where the question as to what is covered by it is in doubt the question must be resolved in favor of the taxpayer.

*Martin L. Hall Co.* v. *Commonwealth*, 215 Mass. 326, 329.
*Gill* v. *Bartlett*, 224 Fed. Rep. 924, 926.

*L.*

*Power to Impose Inheritance Tax is Limited.*

An inheritance or succession tax is an excise tax. Such a tax cannot be lawfully levied unless some necessary incident of the transfer of title depends for its efficacy upon the law of the state levying the tax. If the property is not physically within the jurisdiction of the taxing power and its complete succession may be accomplished without invoking any privilege or sanction conferred by its laws, then there is nothing to which taxation can attach.

*Walker* v. *Treasurer & Receiver General*, 221 Mass. 600.
*Welch* v. *Treasurer & Receiver General*, 223 Mass. 87.

In the case at bar it is agreed that the trusts may be enforced in the several states where the land is situated without resort to the laws or the courts of Massachusetts (Record, p. 5).

The only possible conclusion is therefore that no tax can be legally imposed on these shares representing equitable interests in foreign real estate.

## *M.*

### *Shares in Real-Estate Trusts Different from Shares of Stock.*

Shares of stock in corporations were made personal property by statute as early as 1836 (see Rev. Stats. c. 7, sec. 4). The reasons are stated in—

> *Hawley* v. *Malden*, 204 Mass. 138; 232 U.S. 1.

The case of shareholders in a trust is very different. They are not liable to an annual tax.

> *Hoadley* v. *County Com.*, 105 Mass. 519.
> *Gleason* v. *McKay*, 134 Mass. 419.

The reasoning of these cases applies with equal force in the matter of inheritance taxes.

It is doubtless by reason of the above cases that shares in real-estate trusts are not subject to a yearly tax.

## *N.*

### *Foreign Trusts.*

The trusts in question are foreign trusts. The Declaration of Trust of the Amoskeag Manufacturing Company recites that it was made in New Hampshire and with reference to the laws of New Hampshire and should be construed according to the laws of that state (Record, pp. 10, 17).

The Boston Ground Rent Trust Agreement and Declaration of Trust was recorded in Illinois, and provided that third parties should not be affected with

notice of votes or agreements of shareholders until same should be recorded in Illinois.

The Treasurer and Receiver General of Massachusetts has the burden of showing whatever is necessary to make out his claim. He has not introduced any evidence as to the laws of New Hampshire or Illinois as to trusts or partnerships or equitable conversion.

For all that appears the two trusts in question are considered to be trusts and not partnerships in New Hampshire and Illinois and elsewhere outside of Massachusetts.

If these trusts are what they purport to be and not partnerships, then there is no basis whatever for levying a tax on the shares or on the appellant on account of the shares in question.

## *O.*

### *Assumptions.*

What the court in Massachusetts has done comes to this:

*First,* it has assumed that the law of New Hampshire and Illinois as to real-estate trusts is the same as that of Massachusetts, and has then found that these trusts are not pure trusts, but only partnerships.

*Second,* it has assumed that the law of New Hampshire and Illinois as to equitable conversion of partnership real estate is the same as that of Massachusetts, and has then proceeded to find that the land in question must be treated as equitably converted *ab initio.*

*Third,* it has assumed that an equitable interest in equitably converted real estate is a movable and as such follows the person of the owner.

It is not, we submit, due process of law to decide a case upon assumptions like the foregoing, especially when the finding as to equitable conversion is contrary to law and the admitted facts.

*P.*

*Trusts and Partnerships.*

When is a trust not a trust? Answer: When it is a partnership.

A trust is a partnership when the shareholders for the time being can dictate what shall be done.

*Williams* v. *Milton,* 215 Mass. 1.
*Bartlett* v. *Gill,* 221 Fed. Rep. 479.

If the shareholders for the time being have the power to alter the trust and decide what shall be done, then they can determine whether the real estate shall be converted or not. So long as the matter of sale remains uncertain there is no ground for saying that there has been an equitable conversion. If, by virtue of the control of the shareholders, there is a partnership, then it follows that there is no equitable conversion until the shareholders have decided upon a sale.

*Q.*

*Conversion ab Initio.*

It was necessary for the Massachusetts court to find a conversion *ab initio* in order to reach the result which was reached.

Nothing short of this will sustain the decision.

It is respectfully submitted that the facts needed to produce an equitable conversion *ab initio* are wanting

in the present case, both as to the Amoskeag Manufacturing Company and as to the Boston Ground Rent Trust. When Mrs. Dana died both trusts were to continue for many years.

The question as to whether the real estate would be sold or not was still undecided. There was therefore no conversion, either actual or assumed.

There was, to be sure, at the moment both real and personal property belonging to the trust, but the shareholders could alter the trust and create a new one, and the manner of winding up was not finally determined. We claim that there was no equitable conversion at all, and consequently no equitable conversion *ab initio*, and the result reached by the court was therefore wrong.

*R.*

*Real Estate Immovable.*

Real estate can have only one situs. Even if considered as equitably converted into personalty it still has only one situs. It cannot actually follow the person of the owner. It is immovable.

It is well settled that tangible personal property permanently located in one state cannot be subjected to a yearly tax in another state.

> *Union Transit Co.* v. *Kentucky*, 199 U.S. 194.

While this rule has not as yet been applied to succession taxes in the case of ordinary personal property it should on principle, we think, be applied in the case of succession to real estate, whether it is considered as equitably converted or not.

The strongest reason which can be given perhaps for holding that in the case of death all personal property follows the person of the owner is that the devolution of personal property on the death of the owner is to be determined by the law of the state where he was last domiciled.

*Fidelity &c. Tr. Co.* v. *Louisville*, 245 U.S. 54, 59.

But this is not true as regards real estate. The *lex rei sitae* governs as to the devolution of real estate at the death of the owner as well as during his life, and the question of equitable conversion must be determined by the law of the state where the real estate is located.

Furthermore, in the present case it is agreed that the devolution of the real estate in question does not depend upon the law of Massachusetts, and it is conceded that the *cestui* can enforce all his rights in the states where the land is situated without resorting either to the laws or the courts of Massachusetts.

It follows that the law which is applicable in the case of immovables should be applied here, and the succession taxes levied upon the appellant should be declared illegal.

*S.*

*Decision Contrary to Facts.*

It is alleged in the bill and admitted by the answer that it is the law of all the states in which the real estate in question is located that the trust as to said real estate may be enforced by the courts of said states without resort to the laws or the courts of Massachusetts.

The decision of the Massachusetts court is inconsistent with this admitted fact.

The decision of the Massachusetts court in effect rests upon the theory that the rights of the appellant are to be determined by the law of Massachusetts and not by the law of New Hampshire and the other states where the land is situated.

The decision of the Massachusetts court accordingly, being contrary to admitted facts, must be now held to be erroneous.

Mr. Dana's rights do not depend upon the laws of Massachusetts, but do depend upon the laws of the states where the land is situated. There is therefore no basis for a tax in Massachusetts.

The law is well stated in *Attorney General* v. *Barney*, 211 Mass. 134, by MORTON, J., as follows:

> "In order to be valid the tax must be levied by the authority that confers the privilege upon property which passes by virtue of the privilege."

The same thing may be stated more briefly as follows:

Only that state which can deliver the goods is entitled to a rake-off.

## *T.*

### *Boston Ground Rent Trust Compared with Duluth and Gladstone Trust.*

The decision of the Massachusetts court was in favor of Mr. Dana in regard to his equitable interest under the Duluth and Gladstone Trust. The court, to be sure, found there was, or rather was to be, an equitable con-

version of the real estate, but further found that this conversion was not *ab initio*, and so did not make Mr. Dana's equitable interest subject to a succession tax.

The property of the Duluth and Gladstone Trust consisted entirely of real estate (Record, p. 4), without any admixture of personal property, and this was held to be decisive on the question whether the equitable conversion was *ab initio* or not.

If the property of the Boston Ground Rent Trust in like manner had been all real estate, then presumably the same result would have been reached and its shares would have been held to be non-taxable.

Now in this connection it should be noted that it was a matter of chance that the property of the Boston Ground Rent Trust was partly personal property on July 21, 1915, the date of the death of Edith L. Dana. The trust deed, paragraph 4, indicates that the trustees shall use all money paid to them in the purchase of real estate.

It is later in the deed provided that the trustees may in their discretion set aside some of the income for a contingent fund, or sinking fund, but this is optional with the trustees. The trustees are authorized, in paragraph 5 of the trust deed, to raise money for purposes of the trust by mortgaging the real estate. If the trustees see fit to have it so, all the property of the trust may be in the shape of real estate from time to time.

What will be the result when this occurs? Will the shares then become non-taxable according to the opinion of the Massachusetts court? Is the nature of the shares to be constantly shifting—now real and now personal property? Can it be that a matter of taxa-

tion is to depend upon such uncertainties and fluctuations and presumptions?

We respectfully submit that the law as declared by the Federal Courts in Massachusetts is good law and should be followed in this case.

It should further be especially noted that the statement of Mr. Justice LORING in his opinion (Record, p. 34), that the personal property on hand July 21, 1915, of the Boston Ground Rent Trust "came into existence by virtue of a clause in the declaration of trust providing that the trustees might set aside not more than ten per cent of the annual income for a contingent fund or sinking fund or both," is not justified. It may have been money waiting investment or income not yet divided (Record, p. 19).

It may have been raised by a mortgage on real estate.

It consisted of a bank account and securities (Record, p. 5), and amounted to about 6 per cent of the total assets. In *Bartlett* v. *Gill* such money was in large part held to be real estate, under the doctrine of equitable conversion.

*U.*

*Succession Taxes cannot be Based on Equitable Conversion.*

The question of the jurisdiction of the state to tax is one of fact, and cannot turn upon theories or fictions.

The doctrine of equitable conversion cannot be applied in proceedings for the collection of inheritance or succession taxes.

*Connell* v. *Crosby*, 210 Ill. 380, 390.
*In re Swift*, 137 N.Y. 77, 86.
*Hale's Estate*, 161 Pa. St. 181, 184.

*Succession of Westefeldt*, 122 La. 836.
*The People* v. *Kellogg*, 268 Ill. 489.
*In re Wolcott's Estate*, 157 N.Y. Supp. 268.
*In re McKinlay's Estate*, 166 N.Y. Supp. 1080.

In this case the interest was that of a partner in partnership real estate situated in another state. Held, there was no tax.

*V.*

*Conclusion.*

Upon all the grounds above set forth the decision should be in favor of the appellant, Richard H. Dana, individually.

HOLLIS R. BAILEY,
For Richard H. Dana, Individually, Appellant.

Office Supreme Court, U. S.
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# Supreme Court of the United States

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# Supreme Court of the United States

October Term, 1918.

No. 276.

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RICHARD H. DANA, INDIVIDUALLY, PLAINTIFF IN ERROR,

*v.*

RICHARD H. DANA, EXECUTOR OF THE WILL OF EDITH L. DANA, AND CHARLES L. BURRILL, TREASURER AND RECEIVER-GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

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IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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## *BRIEF FOR DEFENDANT IN ERROR, TREASURER AND RECEIVER-GENERAL OF MASSACHUSETTS.*

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### STATEMENT OF CASE.

This is a writ of error seeking to reverse a decree of the Supreme Judicial Court of Massachusetts (227 Mass. 562), holding certain property of Edith L. Dana, who died a resident of Massachusetts, to be subject to a legacy and succession tax. The proceeding is a statutory (St. 1909, c. 490, pt. IV, § 21) petition for

instructions originally filed in the Probate Court for the County of Middlesex. After a decree there that all the items in question were subject to a tax, there was an appeal to the Supreme Judicial Court, where the case was reserved for the determination of the full court.

Mrs. Dana died a resident of Massachusetts on July 21, 1915. The property in question is as follows: —

| | |
|---|---|
| Interest under Duluth and Gladstone Real Estate Trust appraised at . . . . . | $3,000 |
| 30 preferred shares of Amoskeag Manufacturing Company appraised at . . . . . | 2,970 |
| 45 common shares Amoskeag Manufacturing Company appraised at . . . . . | 2,880 |
| 130 shares of Boston Ground Rent Trust appraised at | 13,000 |

The Amoskeag Manufacturing Company is a voluntary association conducting a large manufacturing business, whose property is held in trust under an elaborate declaration of trust (Rec., p. 10), the interests of its members being represented by negotiable certificates analogous to certificates of stock in a corporation. Its property consists of real estate in New Hampshire and personal property situated partly in New Hampshire and partly in Massachusetts. At the death of Mrs. Dana there were twelve trustees, two residents of New Hampshire and ten residents of Massachusetts. (Rec., p. 12.) Section 5 of Article III of the declaration of trust (Rec., p. 15) provides: —

"Shares shall evidence only the rights specifically set forth in this instrument. The death of a shareholder or Trustee during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the legal representatives of the deceased shareholder to an accounting, or to take any action

in the courts or elsewhere against the Trustees, but the executors, administrators or assigns of any deceased shareholder shall succeed to the rights of such decedent under this trust and be entitled to a certificate in their own names upon surrender properly endorsed of the certificate or certificates for the shares owned by such decedent. The ownership of shares hereunder shall not entitle the shareholder to any title in or to the trust property whatsoever, or right to call for partition or division of the same, or for an accounting."

Article V, section 1, is as follows: —

This trust shall continue for the term of twenty-one years after the death of the last survivor of the persons whose names are signed hereto, and of the children of said persons who are living at the time of the execution hereof, at which time the then Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same as hereinbefore provided among the holders of shares hereunder according to their respective holdings; provided, that if prior to the expiration of said period, the holders of at least two-thirds of the preferred shares and two-thirds of the common shares then outstanding shall at a meeting called for the purpose, or at any regular meeting in the call for which notice is given of the proposed action, vote to terminate or continue this trust, then the trust shall either terminate or continue in existence for such further period as may then be determined. For the purpose of winding up the affairs and of liquidating the assets of the trust, the then Trustees shall continue in office until such duties have been fully performed.

The Boston Ground Rent Trust is a real estate trust created by an agreement and declaration of trust. (Rec., p. 18.) Its property is chiefly real estate, all situated outside of Massachusetts. About six per cent. of its property consists of personal property situated in

Massachusetts. At the death of Mrs. Dana there were five trustees, all residents of Massachusetts. (Rec., p. 5.) The interests of the beneficiaries of the trust are represented by certificates issued by the trustees. The declaration of trust (Rec., p. 19) contains the following provision as to the transfer of shares: —

"9. Shares may be transferred on the books of said trustees by the person named in the certificate thereof, his attorney or legal representative, upon the surrender of the certificate, and a new certificate, shall be issued to the transferee, who shall thereupon become subject to the terms of this agreement; but no share shall be sold until the holder thereof shall have first in writing offered it for sale to said trustees, who shall as such trustees have the option, for ten days after the receipt of such offer, of buying the same at the last preceding appraisal made by them. They shall make such appraisal annually or oftener, as they may deem best. Shares so purchased by said trustees may be held as part of said contingent or sinking fund, or sold by them, at their discretion. Devises by will, distribution of the estates of persons dying intestate, and distribution of trust funds among those entitled thereto upon the termination of trusts, shall not be deemed sales for the purpose hereof."

This declaration of trust also contains the following: —

14. At and upon the expiration of twenty years, after the death of the last survivor of the following-named persons: —

[Here follow the names of eighteen persons]

Or at such earlier time as three-fourths in value of the shareholders may, by an instrument in writing, signed and acknowledged in the manner prescribed for the acknowledgment of deeds, and recorded in the office of the Recorder of Deeds for said Cook County, Illinois, appoint, said trustees shall terminate

this trust by selling all property then held by them, as such, and dividing the proceeds among the shareholders.

Provided, however, that upon the request of three-fourths in value of the shareholders, in writing, signed, acknowledged and recorded as above provided, said trustees may, if it seems to them judicious so to do, convey the trust property to new or other trustees, or to a corporation, according to the terms of such request, and in the manner stated therein, being first duly indemnified for any outstanding obligation; and said trustees upon filing in said Registry of Deeds for Cook County, Illinois, a certificate that they have complied with such request, shall be under no further obligation.

Provided, however, and it is especially understood and agreed, that nothing in this clause contained shall be construed as making it obligatory upon said trustees to comply with such request to convey. (Rec., p. 20.)

The interest in the Duluth and Gladstone Real Estate Trust is an equitable interest in certain real estate in Minnesota and Michigan held by the respondent, Richard H. Dana, as sole trustee, under a declaration of trust for the benefit of himself, his wife and a third person. The interests of the beneficiaries are not represented by certificates of any sort. The declaration of trust (Rec., p. 7) recites the amount of the contribution of each beneficiary to the purchase price of the property and provides for the division of the net income, and, upon the sale of the property, the division of the proceeds among the beneficiaries in certain specified shares. With certain restrictions it recognizes the right of the beneficiaries to assign their interests. (Rec., p. 8.)

It is alleged in the petition, and admitted in the answer, that it is the law of all the States in which any

of the land included in these trusts is situated that the trusts as to the real estate may be enforced by the courts of such States without resort to the laws or the courts of Massachusetts, where the trustees for the most part reside. (Rec., pp. 4, 5.)

All of this property passed by the will of the deceased (Rec., p. 6) to her husband, the plaintiff in error. He contended that the interests of the deceased in the real estate held by each of these trusts constituted equitable estates in land lying outside the Commonwealth of Massachusetts and were for that reason not subject to succession taxes in that State, even though owned by a person domiciled there.

The court, by an application of the principles of equitable conversion, held that the provisions of the declarations of trust of the Amoskeag Manufacturing Company and the Boston Ground Rent Trust must be taken to work a conversion of the entire property held in each of these trusts into personalty, such conversion to date from the creation of the trust. Accordingly, it was held that the shares of these trusts were personal property and thus subject to a succession tax by the state of Mrs. Dana's domicil.

As to the Duluth and Gladstone Rea' Estate Trust, it was held that as to a part of the real estate Mrs. Dana was an equitable owner and that as to the remainder she held an equitable lien to secure a debt due her. (Rec., p. 34.) It was held that there was no equitable conversion from the beginning under the terms of this trust and that for that reason it was not within the power of the Commonwealth to impose a tax except on account of the debt secured by the lien as above stated. (Rec., p. 35.) The

case was thereupon remanded for a hearing before a single justice in order to determine whether any tax was due on this construction of the last-mentioned trust. (Rec., p. 37.)

Thereafter, a final decree was entered affirming the decree of the Probate Court to the effect that the shares in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust were subject to the tax and reversing that decree as to the interest in the Duluth and Gladstone Real Estate Trust, and declaring that interest not to be subject to the tax. (Rec., p. 26.) This disposition of the last-mentioned item resulted from facts as to the debt described by the lien which subsequently developed. No question is now raised as to so much of the decree as refers to the interest in the Duluth and Gladstone Real Estate Trust.

The plaintiff in error assigns that there was error in this final decree in the following particulars: —

(1) In that it held that the shares of the Amoskeag Manufacturing Company and the Boston Ground Rent Trust were property within the jurisdiction of the Commonwealth subject to the legacy and succession tax;

(2) In that by holding this property subject to the tax it deprived the plaintiff in error of his property without due process of law;

(3) In that it held that the interest of the deceased in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust had been converted into personalty prior to her death.

## STATUTES.

The basic provision of the Massachusetts legacy and succession tax in force at the death of Mrs. Dana was as follows: —

*St. 1909, c. 490, pt. IV, § 1, as amended by St. 1912, c. 678, § 1.*

"All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate within the commonwealth, or any interest therein, belonging to persons who are not inhabitants of the commonwealth, which shall pass by will, or by the laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made or intended to take effect in possession or enjoyment after the death of the grantor, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of this commonwealth exempt from taxation, or for or upon trust for any charitable purposes, to be carried out within this commonwealth or to or for the use of a city or town within this commonwealth for public purposes, or to or for the use of (class A) the husband, wife, lineal ancestor, lineal descendant, adopted child, the lineal descendant of any adopted child, the adoptive parent or lineal ancestor of an adoptive parent, the wife or widow of a son, or the husband of a daughter, of a decedent, or to or for the use of (class B) the brother, sister, nephew or niece of a decedent, shall be subject to a tax of five per cent of its value for the use of the commonwealth, if its value does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its

value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class A shall be subject to a tax of one per cent of its value for the use of the commonwealth if such value does not exceed fifty thousand dollars, to a tax of two per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of three per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of four per cent if its value exceeds one million dollars; and such property which shall so pass to or for the use of a member of class B shall be subject to a tax of two per cent of its value for the use of the commonwealth if such value does not exceed ten thousand dollars, to a tax of three per cent if its value exceeds ten thousand and does not exceed twenty-five thousand dollars, to a tax of five per cent if its value exceeds twenty-five thousand and does not exceed fifty thousand dollars, to a tax of six per cent if its value exceeds fifty thousand and does not exceed two hundred and fifty thousand dollars, to a tax of seven per cent if its value exceeds two hundred and fifty thousand and does not exceed one million dollars, and to a tax of eight per cent if its value exceeds one million dollars; and administrators, executors and trustees, and any grantees under such conveyance made during the grantor's life, shall be liable for such taxes, with interest, until the same have been paid; but no bequest, devise or distributive share of an estate which shall so pass to or for the use of a husband, wife, father, mother, child, adopted child, adoptive father or adoptive mother of the deceased, unless its value exceeds ten thousand dollars, and no other bequest, devise or distributive share of an estate unless its value exceeds one thousand dollars, shall be subject to the provisions of this act; but no tax shall be exacted upon property so passing which shall reduce its value below the amount of the above exemptions. All taxes under this act shall be paid out of and chargeable to

capital and not income, unless otherwise provided in a will or codicil, but nothing herein contained shall affect any right of the commonwealth to collect such tax or lien therefor."

## QUESTION AT ISSUE.

The legacy and succession tax statute of Massachusetts, so far as it refers to the property of resident decedents "is as broad as the jurisdiction of the Commonwealth." Kinney *v.* Treasurer and Receiver-General, 207 Mass. 368. Therefore, the sole question presented by this case is whether it is within the constitutional power of the state of Mrs. Dana's domicil to impose a legacy and succession tax at her death upon shares then owned by her in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust.

The Treasurer and Receiver-General, who is by statute (St. 1909, c. 490, pt. IV, § 21) made the representative of the Commonwealth in all proceedings relating to such taxes, contends that these shares are subject to this tax upon the following grounds: —

I. Equitable interests (so called) in real estate are subject to the taxing power of the state of the domicil of the equitable owner without reference to the location of the land.

II. The interests of the decedent in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust, prior to her death, had been converted into personalty and were thus subject to taxation at her domicil.

## ARGUMENT.

### I.

### Equitable Interests (so called) in Real Estate are subject to the Taxing Power of the State of the Domicil of the Equitable Owner without Reference to the Location of the Land.

The Treasurer and Receiver-General contends that the taxes imposed in this case upon the interests of the deceased in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust should be sustained, on the particular ground just stated, without resort to the principles of equitable conversion upon which the decision of the State court was based.

The declarations of trust of the Amoskeag Manufacturing Company and the Boston Ground Rent Trust, as the court below points out, created partnerships (Rec., p. 30), but the legal title to the property of the partnership, in each instance, remained in the trustees, who managed it and the business of the partnership for the benefit of the members or shareholders, subject to certain control by the latter to be exercised through meetings duly called as provided in the declaration of trust.

The Duluth and Gladstone Real Estate Trust was, apparently, not a partnership. Three persons, including the deceased, had contributed varying sums toward the purchase price of two parcels of land. The legal title was conveyed to one of them, who executed a declaration of trust which set forth the duties of the trustee and specified the manner in which he should

devote the net income of the property and its proceeds when sold.

In none of these cases did the partners or beneficiaries have any interest or title at common law to the realty of the trust. Apart from statute their rights are exclusively cognizable in courts of equity.

(*a*) *Nature of Equitable Interests.*

Story thus defines a trust: —

"A trust in the most enlarged sense in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands, belong wholly, or in part, to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits, or charges constitute the trusts, which courts of equity will compel the legal owner, as trustee, to perform in favor of the *cestui que trust*, or beneficiary."

2 Story's Equity Jurisprudence, § 964.

In other words, courts of equity recognize the legal title of the trustee in the trust *res*, but require him, because of the obligation which he has voluntarily assumed or which those courts consider is imposed upon him by his relation to another, to hold and use that estate or title strictly for the benefit of that other. Except where their powers have been enlarged by statute, courts of chancery enforce these obligations solely by controlling or directing the action of the

owner of the legal title by means of decrees *in personam* directed to him, never *in rem* by control of the property itself.

Thus, the equitable rights of the beneficiary of a trust are strictly *in personam*, or, with more accuracy, *in personam ad rem*. If a court of equity ever does more in enforcing a trust than to direct the trustee to act with reference to the trust *res*, it must be by some power conferred upon it by a positive statute, and not by any power developed in the exercise of his historic jurisdiction.

It follows that the right of the beneficiary of a trust is purely a right *in personam*, a right that an individual trustee act in his ownership of property in a specified way.

Professor Langdell thus analyzes rights of this character:—

"There are, however, true equitable rights, and also true equitable wrongs, the latter being violations of equitable rights. A true equitable right is always derivative and dependent, *i.e.*, it is derived from, and dependent upon, a legal right. A true equitable right exists when a legal right is held by its owner for the benefit of another person, either wholly or in part. Such a right may be defined as an equitable personal obligation. It is an obligation because it is not ownership; and because it is relative, *i.e.*, it cannot exist without a correlative duty; and it is personal because the duty is imposed upon the person of the owner of the *res* (*i.e.*, of the legal right), and not upon the *res* itself. And yet courts of equity frequently act as if such rights were real obligations, and even as if they were ownership. Indeed, it may be said that they always so act when they can thereby

render the equitable right more secure and valuable, and yet act consistently with the fact that such right is in truth only a personal obligation. For example, a personal obligation can be enforced only against the obligor and his representatives; but an equitable obligation will follow the *res* which is the subject of the obligation, and be enforced against any person into whose hands the *res* may come, until it reaches a purchaser for value and without notice. In other words, equity imposes the obligation, not only upon the person who owned the *res* when the obligation arose, but upon all persons into whose hands it afterward comes, subject to the qualification just stated. But the moment it reaches a purchaser for value and without notice, equity stops short; for otherwise it would convert the personal obligation into a real obligation, or into ownership. Why is it, then, that equity admits as an absolute limitation upon its jurisdiction a principle or rule which it yet seems always to be struggling against, namely, that equity acts only against the person, — *æquitas agit in personam?* One reason is (as has already appeared) that equity has no choice or option as to admitting this limitation upon its jurisdiction. Another reason is that if equitable rights were rights *in rem*, they would follow the *res* into the hands of a purchaser for value and without notice; a result which would not only be intolerable to those for whose benefit equity exists, but would be especially abhorrent to equity itself. Upon the whole, it may be said that equity could not create rights *in rem* if it would, and that it would not if it could."

Langdell, Equity Jurisdiction, p. 5.

As Professor Langdell points out, courts of equity often act as if equitable rights constituted ownership of property; but, as he also points out, they indicate plainly that such rights are not ownership when they at once cease to regard them as such upon the appear-

ance of a *bona fide* purchaser for value. In fact, when a court of equity talks about an equitable interest in property, it is merely applying in a special case its maxim, "that is done which ought to be done." As the beneficiary ought to own the property or an interest in it, the court assumes that he does so own it so long as no higher equity arises. In that case, as in the case of a *bona fide* purchase for value, it is no longer equitable to make the assumption, and so it is abandoned. In truth, it always was an assumption.

The argument is in no wise affected by the opposing views as to the historical origin of uses. Whether they be regarded as the creation of chancery procedure or an improvement of an idea borrowed from the early German law, their character in modern times is the same. Mr. Justice Holmes, in his essay on Early English Equity, thus concluded his argument for the latter view: —

"If the foregoing argument is sound, it will be seen that the doctrine of uses is as little the creation of the subpœna, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with. It is true, however, that the form of the remedy reacted powerfully upon the conception of the right. When the executor ceased to intervene between testator and devisee the connection between devises and uses was lost sight of. And the common law courts having refused to protect even actual pernors of profits, as has been explained, the only place where uses were recognized by that name was the Chancery. Then, by an identification of substantive and remedial rights familiar to students, a use came to be regarded as merely a right to a subpœna. It lost all character of a *jus in rem*, and passed into the category of choses in

action. I have shown elsewhere the effect of this view in hampering the transfer of either the benefit or burden of uses and trusts."

2 Select Essays in Anglo-American Legal History, 716.

For the last-mentioned discussion, see Holmes, The Common Law, pp. 407–409. It is there pointed out that the difficulty of transferring a mere right, which was so strongly felt in the early days of the law, was applied to uses and trusts, and that in the days of Queen Elizabeth all the judges of England held that a trust could not be assigned "because it was a matter in privity between them and was in the nature of a chose in action."

The freedom with which courts of equity will enforce trusts of land situated beyond their jurisdiction, when they have acquired jurisdiction over the trustee, clearly illustrates the nature of the interest of the beneficiary.

Kildare *v.* Eustace, 1 Vern. 419.
Massie *v.* Watts, 6 Cranch, 148.
Gardner *v.* Ogden, 22 N. Y. 327.

Upon precisely the same principle, specific performance will be decreed of a contract to convey land not within the territorial jurisdiction of the court.

Penn *v.* Lord Baltimore, 1 Ves. 444.
Brown *v.* Desmond, 100 Mass. 267, 269.

In Massie *v.* Watts, *supra*, at p. 160, Marshall, C.J., stated the general principle thus: —

"In a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."

In Hart *v.* Sansom, 110 U. S. 151, 154, 155, Mr. Justice Gray thus summarized the basis of this branch of equity jurisdiction: —

"Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. Langdell Eq. Pl. (2d ed.), §§ 43, 184; Massie *v.* Watts, 6 Cranch, 148; Orton *v.* Smith, 18 How. 263; Vandever *v.* Freeman, 20 Tex. 334.

It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Felch *v.* Hooper, 119 Mass. 52; Ager *v.* Murray, 105 U. S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title."

Undoubtedly, as the law of the situs controls the title to, the alienation of, and, in general, the dealing

with realty, the validity of trusts of realty, must frequently be determined by the law of the situs.

United States *v.* Fox, 94 U. S. 315.
Jones *v.* Habersham, 107 U. S. 174, 179.

In such a case, whenever, in a proceeding to enforce a trust of land in another state, a question of the validity of the trust or of the meaning and effect of the trust instrument arises, it may become the duty of the court to solve such question by the application of the law of the jurisdiction where the land lies. But this is no more than courts are daily doing in dealing with contracts made to be performed beyond their jurisdiction. When the validity or effect of the trust is established the court having jurisdiction over the trustee proceeds by a decree *in personam* against him to require him to deal with the property as the nature of his trust obligation demands.

(*b*) *Power of State of Situs to establish Remedies in rem and their Effect.*

As Mr. Justice Gray suggests in the passage from Hart *v.* Sansom, above quoted, "It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." See Felch *v.* Hooper, 119 Mass. 52. Other forms of remedy *in rem* might be provided. See, for example, Arndt *v.* Griggs, 134 U. S. 316, 320, 329.

Where no such remedy *in rem* exists by statute a

court, having jurisdiction of the land but not of the trustee, is powerless.

Spurr *v.* Scoville, 3 Cush. 578.
McCann *v.* Randall, 147 Mass. 81, 99.

The petition in this case alleges (Rec., p. 5) and the answer admits, that remedies of this character are provided by the statutes of the various states where the land held by these trusts is located. The existence of such remedies has no material bearing upon the nature of the equitable rights of this deceased in these trusts. The agreements here involved still create trusts of the classic form known to English chancery jurisdiction, imposing a personal obligation upon the trustees to deal with the property entrusted to them. This obligation may still be enforced by proceedings brought against them personally in any court of whose process service can be obtained upon them.

This statutory remedy *in rem* is merely an additional weapon placed by the Legislature in the hands of the chancellor of the jurisdiction where the land is located to enable him more readily to enforce performance by the trustee of this personal obligation. In the absence of more definite statement, it cannot be said to change the fundamental nature of trust rights.

(c) *Power of State of Situs to tax. Its Nature.*

So also the sovereignty which has dominion over the land may levy taxes upon it, the burden of which will fall upon a non-resident beneficiary of a trust, or through its control over dealings with the property it

may impose transfer or succession taxes upon the substitution of a new beneficiary in place of the original beneficiary of the trust. Dominion over the property gives it jurisdiction over all transactions concerning the property which are in any way dependent for validity or effect upon its laws. In other words, a Legislature, like a court of chancery, may treat the rights of the beneficiary of trust property within its power as if they actually constituted interests in the property itself.

Kinney *v.* Treasurer and Receiver-General, 207 Mass. 368.
Peabody *v.* Treasurer and Receiver-General, 215 Mass. 129.
Priestley *v.* Treasurer and Receiver-General, 230 Mass. 452.

In such cases the taxing power deals with the rights of the beneficiary as an interest in the property for the purpose of imposing burdens upon him precisely to the same extent (and no farther) that a court of equity of the jurisdiction deals with them as such interests for his benefit.

But the mere fact that the sovereign having jurisdiction of the property thus exercises its power to deal with the property does not change the fundamental nature of the rights and duties created by the declaration or agreement of trust. It still creates a personal obligation on the part of the trustee enforceable wherever he may be found. The principles upon which a court of equity acts are not changed merely by the exercise of the taxing power by the jurisdiction where the land lies.

(*d*) *Power to tax the Personal Obligation. Its Basis.*

The question thus arises: Is this personal obligation, that the trustee perform certain duties with reference to the trust *res*, property of the beneficiary of a trust which is taxable elsewhere than in the jurisdiction where the land lies?

This is not the question whether jurisdiction over the trustee would alone give power to tax in a case of this character.

See Blackstone *v.* Miller, 188 U. S. 189.
Bliss *v.* Bliss, 221 Mass. 201.

Such cases go upon the ground that a jurisdiction to which resort must be had to enforce an obligation by reason of that fact has such power over it that it may impose a succession tax upon it. Such a question arises only when a jurisdiction other than that of the domicil of the owner of an obligation seeks to levy a tax on account of it. As pointed out in the opinion of the State court (Rec., p. 36), on the allegations of the petition in this case, no such resort to Massachusetts was necessary.

No argument based upon these cases was addressed to the State court. The learned justice who wrote the opinion seems to have misapprehended the attitude of the respondent upon this point. In the case at bar the owner of the personal obligation which arose out of these trusts died domiciled in Massachusetts, and the question merely is:—Is it within the power of the jurisdiction of her domicil to impose a legacy and succession tax upon the passing of these obligations by her will to her husband?

It is settled beyond dispute that a man's entire personal property upon his death may be regarded as *universitas* and succession to it taxed at his domicil, whether that succession be intestate or established by will.

Fidelity & Columbia Trust Co. *v.* Louisville, 245 U. S. 54, 59.
Bullen *v.* Wisconsin, 240 U. S. 625, 631.
Frothingham *v.* Shaw, 175 Mass. 59.

"The power to tax is not limited in the same way as the power to affect the transfer of property."

Bullen *v.* Wisconsin, *supra*, p. 631.

Thus, the right to tax at the domicil persists even though another jurisdiction, through control of the property, may also impose a succession tax.

Blackstone *v.* Miller, 188 U. S. 189.
Wheeler *v.* Sohmer, 233 U. S. 434.
Hawley *v.* Malden, 232 U. S. 1.
Greves *v.* Shaw, 173 Mass. 205.
Peabody *v.* Treasurer and Receiver-General, 215 Mass. 129.

Accordingly, if the trust *res* in the case at bar had been in no part real estate outside of Massachusetts, there could be no question but that the entire interest of the deceased in each of these trusts would be subject to a succession tax in Massachusetts, no matter how or where the property, or the documents representing it, were held, and whether any of the trustees were resi-

dents of that State or not. This is settled by the decisions of this court and in Massachusetts.

Bullen *v.* Wisconsin, 240 U. S. 625.
Eidman *v.* Martinez, 184 U. S. 578, 581.
Frothingham *v.* Shaw, 175 Mass. 59.
Maguire *v.* Tax Commissioner, 230 Mass. 503.

Does the fact that in the trusts now before the court the trust *res* in part consists of land in other states limit the right of the State of the domicil to impose a tax? That fact merely means that the property to which the personal obligation of the trustees related was in part real estate beyond the jurisdiction of Massachusetts. The nature, extent and personal character of the obligation and the rights and remedies of the beneficiary against the trustees all remain unchanged. The only difference is that the obligation of the trustees to act relates to property which as property must forever remain beyond the reach of Massachusetts. The right of the beneficiary always remains *in personam ad rem*, but now the *res* merely happens to be land instead of personalty.

It is submitted that this change does not change the nature of the right of the beneficiary which is his only property. Of necessity the sovereign powers of a state or nation over property cease at its boundaries, and thus its power to tax as well as its power of eminent domain can have no application to land located beyond its jurisdiction. It may neither take nor tax such property or otherwise impose burdens upon it. All legal estates in such property are inseparable from that property, and thus are beyond its reach.

Such estates are rights in the property itself, good against all the world. They may be created, enjoyed, conveyed, transmitted upon death, applied for the benefit of creditors, taken or taxed for public purposes, or forfeited or escheated only under and by virtue of the laws of their situs. Title to such estates may be determined only by the courts of the situs. Such estates have no existence apart from the land in which they are created.

The rights of a beneficiary in a trust of land have no such characteristics. It is the trustee who has the estate in the property, and upon him are imposed the legal duties incident to such ownership.

See, for example: —

Curry *v.* Dorr, 210 Mass. 430.
Latrobe *v.* Baltimore, 19 Md. 13.

The beneficiary merely has the right to insist that the owner of the legal estate perform an obligation with reference to it, which he has assumed. This obligation he may establish, protect and enforce anywhere that he can find the trustee. Being an obligation relating to land, it is governed in some measure by the law of the situs, for that law may determine what obligations shall be assumed with reference to land within the jurisdiction by the owners thereof, but it is still merely an obligation. It creates no estate in the land, except in the sense that courts of equity, whenever the personal obligation is enforced, will deal with the issue before it as if the beneficiary actually owned an interest in the property coextensive with his obligation. This assumption ceases, however, the moment the

property comes to the ownership of a person who is not subject to the personal obligation.

This personal obligation to which all trusts of land may be reduced is in no sense annexed to the land. It is closely analogous to a simple contract debt or any other chose in action.

Thus, the principles discussed by this court in Blackstone *v.* Miller, *supra*, in dealing with the imposition of a succession tax upon a simple contract debt are applicable here. In that case the court sustained a tax by the state of the residence of the debtor, the deceased creditor being a non-resident, on the ground that power over the debtor gave validity to the debt and to its transfer, and thus conferred jurisdiction to tax succession to it. It was recognized that this power to tax the singular succession to intangible property in no way limited the right of the state of the domicil of the deceased creditor to tax the universal succession, including this debt in it, on the basis of *mobilia sequuntur personam.*

"The universal succession is taxed in one State, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money."

Blackstone *v.* Miller, *supra*, at p. 207.

We are not concerned with the question whether the fact that in two of these trusts all of the trustees, and in the other, ten out of twelve trustees, were residents of Massachusetts would give that State power to tax on the ground of a singular succession there if the deceased had been domiciled elsewhere. The court

below is in error in assuming that any such ground of jurisdiction was urged or involved here.

As the deceased was domiciled in Massachusetts the sole question was whether this property was included within the universal succession and thus taxable as a part of it. If it was not, there was necessarily no singular succession to it within the power of that State. When such a question arises in this court it will then have to pass upon the validity of the limitation placed by the Massachusetts Supreme Judicial Court upon Blackstone *v.* Miller in Bliss *v.* Bliss, 221 Mass. 201, to the effect that Blackstone *v.* Miller applies only when resort must be had to the state claiming to tax for enforcement of a chose in action, and that it does not apply when remedies exist in other jurisdictions.

(*e*) *The Analogy to Corporate Stock.*

As pointed out by the Massachusetts court in Peabody *v.* Treasurer and Receiver-General, 215 Mass. 129, 131, the rights of the beneficiary of a trust in their relation to the power of taxation are closely analogous to shares of stock in corporations.

Ownership of such shares gives to the shareholder certain intangible rights against the corporation. It is under various specific obligations to him and he has definite rights against it in relation to its property. He is entitled to participate in the net profits of its business, to enforce the use of its capital for its corporate purposes, to restrain abuses of corporate powers, and to receive his proportion of the net property of the corporation upon its dissolution.

On the other hand, ownership of such shares constitutes the shareholder a member of the incorporated asso-

ciation, usually with a voice in the selection of its officers and in the management of its affairs. By virtue of that membership he is or often may be made subject to certain liabilities of a greater or less extent. The statute creating the corporation determines the conditions of membership in such an association and imposes such burdens upon and grants such privileges to that membership as it chooses. Such shares are thus property having a distinctly dual character.

Accordingly, shares of stock may be subject to a property tax during the lifetime of the shareholder or to a succession tax on his death by the jurisdiction of his domicil.

> Hawley *v.* Malden, 232 U. S. 1.
> Bullen *v.* Wisconsin, 240 U. S. 625, 631.
> Bellows Falls Power Co. *v.* Commonwealth, 222 Mass. 51; Same Case, 245 U. S. 630.
> Frothingham *v.* Shaw, 175 Mass. 59.

They may also be subjected to the same taxes by the jurisdiction which created the corporation.

> Corry *v.* Baltimore, 196 U. S. 466.
> Greves *v.* Shaw, 173 Mass. 205.
> *In re* Bronson, 150 N. Y. 1.

It would be entirely immaterial in such case that all the property of the corporation was real estate which was entirely within the limits of the state which created the corporation. So it is equally immaterial in the case at bar that, since the land held in these trusts was within the jurisdiction of other states, they could create rights *in rem* therein in the interest of the beneficiaries or could impose taxes upon the land because of

their rights with reference to it or upon succession to those rights. This grows out of the dual character of the beneficiary's right. It is *in personam*, enforceable wherever the trustee may be found, and therefore attaches to the person of its owner and follows him to his domicil like all intangible property. It is also *ad rem* and thus comes within the reach of the sovereign having dominion over the property.

That sovereign may, by statute, give certain characteristics of rights *in rem* to the personal obligation, permitting it to be enforced by a proceeding against the property alone. It may also by statute expressly or impliedly determine that the personal obligation shall be taxed as if it created a right *in rem*. That two jurisdictions may both tax the same property on different theories, or even that one jurisdiction may tax property of the same character on both theories, raises no constitutional difficulties.

Blackstone *v.* Miller, 188 U. S. 189, 207.

It is to be noted, however, that Massachusetts now consistently follows but one theory in its legacy and succession tax statutes. It taxes personal property only upon the theory of the universal succession, imposing no tax upon any property of non-resident decedents within its reach except "real estate, or any interest therein." St. 1912, c. 678, § 1. Priestley *v.* Treasurer and Receiver-General, *supra*.

*(f) Reason for Determining Succession to Equitable Interests in Real Estate in Certain Cases by Law of Situs.*

It will be suggested in reply to the foregoing argument that so-called equitable interests in real estate pass upon the death of their owner to his heirs as determined by the law of the situs, that it thus is that law, as in the case of legal interests, which wholly controls the succession and may alone impose a tax.

This argument fails to analyze the situation. When the beneficiary of a trust dies, and it is desired to enforce it for the benefit of his successors, this is done by proceedings in equity against the trustee in any jurisdiction where he may be found. The court of this jurisdiction, in determining the rights of the parties, is guided by the general principles of equity jurisprudence. Thus, applying the maxim "Equity regards that as done which ought to be done," it deals with the case as if the deceased beneficiary had an estate in the land commensurate with his personal obligation concerning it, though it recognizes the fact that he has not, by taking jurisdiction of the case at all, when the land is beyond its reach. It then "follows the law" and decrees the benefit of the trust to those persons who would succeed to a legal estate or interest of the character assumed if in fact it had existed.

Accordingly, if the nature of the trust requires that the beneficiaries' interest in a trust of real estate be regarded as if it were a fee, it is said that the deceased owned an equitable fee which passed to his heirs at law as determined by the law of the situs. If, on the other hand, the trust *res* is personal property, or, if it is part

realty and part personalty, and the parties, by their trust agreement, have indicated an intention that the rights of the beneficiaries shall be dealt with as if the whole fund were personalty, the court then, upon the death of the beneficiary, treats his rights in the trust as if they constituted ownership of personal property and enforces the trust in favor of the executor or administrator or the next of kin, in accordance with the law of the domicil.

In other words, a court of equity in enforcing a personal obligation assumed by the trustee merely refers to and follows the law which governs the descent or distribution of common law estates or interests in property. Naturally, if the personal obligation relates to real estate in another jurisdiction, it must refer to the law of descent of that jurisdiction, since that law would govern if the trust had been performed by a conveyance from the trustee to the beneficiary before his death.

In fact, the procedure of courts of equity in such cases, when properly analyzed, shows the real intangible and personal nature of the beneficiary's interest. If the beneficiary in fact owned an actual interest in the real estate, the courts of the situs alone would determine title to such interests. On the death of such a beneficiary leaving a will, no such title could be established there or recognized anywhere until the will had been duly proved in the state of the situs. If the beneficiary died intestate, the title could not be perfected in his heirs until after administration in that state. Then the interest could not be sold by an executor or administrator to pay debts of the deceased without the court proceedings required by the laws of such state

in cases of sales of real estate to pay debts. Yet such requirements are utterly inconsistent with the established right to enforce the trust of any court of equity which has jurisdiction over the trustee.

(g) *Decision below Consistent only with Principles above argued.*

The foregoing argument in less elaborate form was made to the Massachusetts Supreme Judicial Court, and it was urged that, because of their fundamental nature, all the equitable rights of the testator described in the petition were within the reach of the tax power of her domicil. The court disposed of this argument merely by affirming, without the citation of any relevant authorities, the contention of the respondent Dana that "an equitable estate in land lying outside of the Commonwealth, although owned by one domiciled within the Commonwealth, at his death is not subject to a succession duty here." (Rec., p. 29.) It then proceeded to decide the question of the power to tax upon grounds of equitable conversion, holding that where, from the terms of the trust agreement, it could be found that the parties intended that the entire trust property should be treated as personal property from the date of the creation of the trust, it was taxable as personal property in Massachusetts, but that when no such intention could be found the rights of the beneficiary, so far as the trust property is real estate, must be regarded as strictly real estate and taxable only as such.

Both before and since this decision, however, that court has held that in all cases, whether conversion is

to be found or not, the interest of the beneficiary is within the jurisdiction to tax of the State where the land lies.

Peabody *v.* Treasurer and Receiver-General, 215 Mass. 129.
Priestley *v.* Treasurer and Receiver-General, 230 Mass. 452.

But is it not essential to the application of the principles of conversion that the interest of the beneficiary shall, in all cases, be something other than an interest in land? If it were that and no more, no agreement or intention of the parties, however clearly expressed, could take that interest out of the land, bring it into another state where the beneficiary happened to dwell, and there subject it to taxation. Even a leasehold interest in land, though personal property, a chattel real, is subject to direct taxation only by the jurisdiction where the land lies.

Union Transit Co. *v.* Kentucky, 199 U. S. 194,

Apparently, too, such estates pass upon the death of their owners by the law of their situs, and thus may be subject to a succession tax only by the jurisdiction of the situs.

2 Bl. Comm. (Cooley's Ed.) 388, note.
1 Jarman on Wills, 2, 4.
14 Cyc. 21.

The application of the principle of conversion by a jurisdiction other than that of the situs seems necessarily to require that the court is dealing, not with

an interest in land, but with an intangible personal obligation in the nature of a chose in action, which it is enforcing between parties before it. On this basis it was within the power of the court to examine the terms of these agreements and from them to determine the nature of the personal obligation which the parties intended to create. That was a matter over which they had control, since the entire obligation grew out of an agreement made by the parties. But if there were no such personal obligation without the presence of an intention to convert into personalty, there was nothing in Massachusetts to which an agreement to convert, that is, an agreement that the rights of the parties should be personalty, could apply. An agreement of the parties that real estate in another State should be personal property might be recognized by the law of the situs to be effective there, but it could do nothing more than determine the character there of property situated wholly out of the control of Massachusetts.

(*h*) *Conclusion.*

Accordingly, the Treasurer and Receiver-General, in behalf of the Commonwealth of Massachusetts, contends that in all cases of trusts of real property, the rights of the beneficiaries are of such a character that it is within the power of the jurisdiction of the domicil of the beneficiary to impose a succession tax on account of them entirely without reference to the doctrine of equitable conversion. It follows that succession taxes imposed on account of the interests of the deceased in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust were properly sustained by the

Massachusetts court. It of course also follows that the tax assessed on account of the Duluth and Gladstone Trust, where no equitable conversion was found, should also have been sustained. The validity of that tax, however, is not before this court. The amount involved was too small to warrant any attempt to bring that matter before this court upon a petition for certiorari.

Therefore, the respondent urges that the decree of the court below be affirmed on the broad ground above argued. To make the right of a state to impose a tax in a particular case turn on the somewhat obscure doctrines of equitable conversion, granting or denying that right in accordance with the carefully drafted phrases of a contract between parties not interested in promoting taxation, would seem to be a most artificial basis for determining the limitations upon a vital sovereign power.

## II.

### The Interests of the Decedent in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust, prior to her Death, had been converted into Personalty and thus were subject to Taxation at her Domicil.

#### (a) *The Question.*

The State court assumed that there was no question as to the correctness of the proposition that "an equitable interest in land lying outside the Commonwealth, although owned by one domiciled in the Commonwealth at the date of his death, is not subject to a succession duty here." (Rec., p. 29.) The cases, however,

which are cited as examples of that proposition have no bearing upon it. Attorney-General *v.* Barney, 211 Mass. 34, relates only to the assessment of a tax upon the property in Massachusetts of a non-resident decedent. In Walker *v.* Treasurer and Receiver-General, 221 Mass. 600, the deceased merely exercised a power of appointment over property held by trustees in Maryland under a will of a resident of that State. It was merely held that no part of the devolution of the property occurred under the laws of Massachusetts. Title passed entirely by the operation of the Maryland will and the power created thereby.

What is believed to be the fundamental error contained in this assumption is fully set forth by the preceding section of this brief. If that argument be adopted, the grounds upon which the court sustained a tax on the shares of the Amoskeag Manufacturing Company and the Boston Ground Rent Trust need not be considered.

If, however, the assumption of the court be accepted, the result which it reaches necessarily follows. If the case is thus approached, the sole question then becomes whether these two declarations of trust created "equitable estates" in real estate beyond the jurisdiction of Massachusetts or only interests which are to be regarded as personalty and thus taxable by the State of the decedent's domicil.

(*b*) *Massachusetts Law properly applicable.*

The court appears to have answered this question solely with reference to the law of Massachusetts. No other course was open to it. Whether this be regarded

as a question to be determined by the law of the situs of the land, on the ground that that law controls the creation and nature of interests in land and succession thereto upon death,

Clarke *v.* Clarke, 178 U. S. 186,

or a matter as to the interpretation of an executory contract relating to land and thus to be referred to the *lex loci contractus*,

Pritchard *v*, Norton, 106 U. S. 124,
Polson *v.* Stewart, 167 Mass. 211,
Atwood *v.* Walker, 179 Mass. 514,

the result is the same.

The real estate of the Amoskeag Manufacturing Company is all situated in New Hampshire. (Rec., p. 15.) Its declaration of trust is expressly declared to be made with reference to the laws of New Hampshire and to be construed according to those laws. (Rec., p. 17.) The Boston Ground Rent Trust was formed "for the purchase and improvement of real estate in the cities of the United States of America." (Rec., p. 18.) It does not appear where the real estate held by this trust at Mrs. Dana's death was located, except that it was all outside of Massachusetts. (Rec., p. 5.) It is not definitely stated where this declaration was executed. However, the trustees are all of Boston, and all the persons on whose lives the duration of the trust depends are also of Boston or vicinity. Provision is made for a delegation of powers "when any trustee is absent from the Commonwealth of Massachusetts." (Rec., p. 20.) This plainly indicates that the trust is

to be administered in Massachusetts. The only conclusion to be drawn is that this declaration was made with reference to the laws of Massachusetts. The provision for recording in Cook County, Illinois, merely suggests that it was contemplated that investments might be made in Chicago. There is nothing to show that any such investments were in fact made.

But whatever law is technically applicable to the construction of these declarations, there was no evidence or allegations before the court as to the law of any state other than Massachusetts concerning the nature of interests of the character created by these declarations or the principles to be applied in construing such declarations. The only suggestion as to foreign law is the allegations in the petition, admitted by the answer, that these trusts may be enforced in the states where the land is situated without resort to the courts or laws of Massachusetts. (Rec., p. 5.) The court interpreted these allegations as an allegation of the existence of statutes in these states which authorize proceedings to enforce trusts with respect to real estate in such states in the absence of jurisdiction over the trustees. (Rec., p. 36.) Whether this is to be done by proceedings in this nature *in rem* (Arndt *v.* Griggs, 134 U. S. 316) or by the appointment of local trustees (Felch *v.* Hooper, 119 Mass. 52) does not appear. In any event, this is merely a matter of procedure, not of substantive rights.

Thus, if any question of foreign law were material, the only course open to the Massachusetts court was to assume that the principles of common law and of equity, as administered in Massachusetts, were the same as those administered in every other state of the

Union whose laws were for any reason applicable in this case.

Cuba Railroad Co. *v.* Crosby, 222 U. S. 473, 479.
The Scotland, 105 U. S. 24, 29.
Parrot *v.* Mexican Central Railway, 207 Mass. 184, 191–194.
Hazen *v.* Mathews, 184 Mass. 388, 391.
Harvey *v.* Merrill, 150 Mass. 1.
See, Note, 67 L. R. A. 33.

Accordingly, whether the pertinent provisions of law were those of Massachusetts or of the situs or *loci contractus*, on the record in this case, the court was required only to apply Massachusetts law.

(*c*) *Massachusetts Law correctly applied.*

Thus, it held that each of these two declarations of trust created partnerships. (Rec., pp. 29, 30.) This was in accordance with well-established rules in Massachusetts.

Phillips *v.* Blatchford, 137 Mass. 510.
Williams *v.* Milton, 215 Mass. 1.
Frost *v.* Thompson, 219 Mass. 360.

Then, after referring to the settled rule of Massachusetts, that partnership realty is in general regarded as personalty so far only as is necessary to pay the debts of the firm, but is otherwise realty (Wilcox *v.* Wilcox, 13 Allen, 252), it held that by the intention of the parties, as expressed in each of these declarations, the cases were taken out of this general rule and

there was worked an "out and out" conversion of the partnership realty into personalty from the date of the execution of the declarations of trust. In this the court was but following an intimation made in Wilcox *v.* Wilcox, *supra.* It was plainly acting in accordance with well-settled principles of equitable conversion.

Ripley *v.* Waterworth, 7 Ves. 425.
Fletcher *v.* Ashburner, 1 Bro. C. C. 497.
Darrow *v.* Calkins, 154 N. Y. 503.
Holland *v.* Cruft, 3 Gray, 162, 180.
Hammond *v.* Putnam, 110 Mass. 232.
Story: Equity Jurisprudence, §§ 790-791; 1212-1214.
Bispham: Principles of Equity, p. 462.

These doctrines have been frequently applied in this court.

Craig *v.* Leslie, 3 Wheat. 563.
Peter *v.* Beverly, 10 Pet. 532, 563.
Taylor *v.* Benham, 5 How. 233.

If on this record it can be regarded as in any way material, they appear to be the law of New Hampshire, the only state where it definitely appears that any of this land is situated.

Vandwalker *v.* Rollins, 63 N. H. 460, 464.

(*d*) *Converted Interests taxable as Personalty.*

Having thus determined that, by all provisions of law possibly applicable, the interests of Mrs. Dana in these two trusts constituted personal property, it

followed as a matter of course that succession to them upon her death was controlled by the law of her domicil, through its control over the universal succession to her property, and that they were thus subject to a succession tax in Massachusetts.

Bullen *v.* Wisconsin, 240 U. S. 625.

Whether each of the various jurisdictions where the land is situated, through their control over the real estate itself out of which these interests arise, also control and may tax a singular succession does not arise. This seems, however, to follow.

Peabody *v.* Treasurer and Receiver-General, 215 Mass. 129.
Priestley *v.* Treasurer and Receiver-General, 230 Mass. 452.

Plainly, it is within the right of any state, which has for any purpose jurisdiction to apply the doctrines of equitable conversion to any property or to any instrument or contract concerning any property, to deal with that property for purposes of taxation solely with regard to its notional character and in disregard of actual form. If a jurisdiction has a right to apply principles of equitable conversion to a given property for any purpose, it is merely a matter of local law and policy whether it shall also apply those principles for fiscal purposes. No Federal question can arise in such a case.

(e) *Conversion in Tax Cases.*

In England, though for historical reasons these principles are not applied in cases of forfeiture, escheat or *bona vacantia* (Talbot *v.* Jevers (1917), 2 Ch. 363), they are given their fullest effect in matters of taxation. Attorney-General *v.* Hubbuck, 13 Q. B. D. 275.

"It is undoubtedly true that for fiscal purposes the courts have given the fullest effect to the doctrine of conversion, disregarding the outward or actual form of the property and considering its notional character under the doctrine of conversion."

Talbot *v.* Jevers, *supra*, at 372.

This same attitude has been adopted in certain jurisdictions in this country in the imposition of succession taxes.

*In re* Coleman's Estate, 159 Pa. St. 231.
Shoenberger's Estate, 221 Pa. St. 112.
*In re* Arbuckle's Estate, 252 Pa. St. 161.
Matter of Mills, 86 App. Div. 555, aff. 177 N. Y. 562.

In cases where courts have refused to follow this rule it has been rather on the ground of statutory construction than constitutional power. The view of those courts seems to be that a purely equitable doctrine is not to be applied in the administration of such a statute.

*In re* Swift's Estate, 137 N. Y. 77.
Connell *v.* Crosby, 210 Ill. 380.

In Massachusetts, however, principles applicable only in equity are applied in determining succession taxes.

See Hill *v.* Treasurer and Treasurer General, 229 Mass. 474, where the purely equitable doctrine, that creditors of a donee of a general power of appointment may reach the trust property upon the exercise of the power, is applied to relieve such property from taxation.

The case of McCurdy *v.* McCurdy, 197 Mass. 248, refuses to apply for purposes of taxation a different doctrine. It merely holds that personal property shall not be required to be brought into that State from the state of the domicil in order to relieve Massachusetts real estate from the encumbrance of a mortgage merely to increase the succession tax on that real estate. This is a matter of exoneration rather than of equitable conversion. It involves entirely different principles.

## III.

### Conclusion.

Accordingly, the Treasurer and Receiver-General contends that the decree in the case at bar, holding the shares of the Amoskeag Manufacturing Company and the Boston Ground Rent Trust to be subject to a succession tax in Massachusetts, the state of the decedent's domicil, must be affirmed both (1) on the ground of the fundamental nature of these interests as personal property and (2) by an application of the principles of equitable conversion.

In order that the principles to be applied in the taxation of interests of this character may be established upon a sound, logical basis and that jurisdiction to tax in such cases may not be left entirely sub-

ject to the control of persons creating such trusts, it is urged that the decision should, if possible, be based upon the first of these grounds.

Respectfully submitted,

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WM. HAROLD HITCHCOCK,
*Assistant Attorney-General.*

# DANA, INDIVIDUALLY, *v.* DANA, EXECUTOR OF DANA, ET AL.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

No. 276. Argued March 24, 1919.—Decided June 2, 1919.

A judgment holding certain shares of such a character as to come within the general succession tax of the State, though the tax was opposed as reaching real property outside of the State, *held* not to involve the validity of the tax statute or of an authority exercised under the State, and hence not to be reviewable by writ of error under Jud. Code, § 237, as amended in 1916.

Writ of error to review 227 Massachusetts, 562, dismissed.

THE case is stated in the opinion.

*Mr. Hollis R. Bailey* for plaintiff in error.

*Mr. William Harold Hitchcock*, Assistant Attorney General of the Commonwealth of Massachusetts, with whom *Mr. Henry C. Attwill*, Attorney General of the Commonwealth of Massachusetts, was on the brief, for defendants in error.

MR. JUSTICE DAY delivered the memorandum opinion of the court.

This is a writ of error seeking to review in this court a decree of the Supreme Judicial Court of Massachusetts. The controversy concerned the right to tax under the Massachusetts Statutes of 1909, c. 490, Part IV, § 1, as amended by Stats. 1912, c. 678, the passing of certain interests under the will of Edith L. Dana, in the Duluth and Gladstone Real Estate Trust, in thirty preferred shares, forty-five common shares of the Amoskeag Manufacturing Company and in one hundred and thirty shares of the Boston Ground Rent Trust.

The probate court held in favor of the Treasurer and Receiver General,—that all of the interests of the testatrix in the several trusts and companies named were taxable under the Massachusetts statute. The case was decided in the Supreme Judicial Court of Massachusetts on June 29, 1917, and final decree entered July 23, 1917. 227 Massachusetts, 562. The ground upon which it is sought to bring the case here on writ of error rests upon the assertion that the Supreme Judicial Court erred in sustaining the succession tax because it was imposed on or on account of real estate situated outside of Massachusetts; therefore, rendering the assessment of the tax a violation of rights secured by the Fourteenth Amendment to

the Constitution of the United States, in that it took the property of the plaintiff in error without due process of law.

The case was decided, and the decree entered in the Supreme Judicial Court since the passage of the Act of September 6, 1916, c. 448, 39 Stat. 726, amending § 237 of the Judicial Code. Since the passage of the amendment, cases brought within its effect, of the character of this one, cannot be brought here by writ of error unless there is drawn in question the validity of a statute of or an authority exercised under the State on the ground of their being repugnant to the Federal Constitution, treaties or laws. Other cases of alleged denial of federal rights, as specified in the statute, can be reviewed in this court only upon writ of certiorari.

An examination of the record in the case and the opinion of the Supreme Judicial Court, shows that neither the validity of the statute, nor the validity of any authority exercised under the State was drawn in question. The case was decided on the view which the Supreme Judicial Court entertained of the character of the property involved, and neither in the record nor in the opinion of the court does it appear that any question was raised or decided which involved the validity of the statute of the State, or of an authority exercised under the State, on the ground of their repugnancy to the Constitution, treaties, or laws of the United States. It follows that the only right of review in this court of the decree of the Supreme Judicial Court of Massachusetts was by writ of certiorari. It is only necessary to refer to our decisions construing the amendment of September 6, 1916. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162; *Ireland* v. *Woods*, 246 U. S. 323; *Stadelman* v. *Miner*, 246 U. S. 544; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 481.

The writ of error must be dismissed for want of jurisdiction.

*Dismissed.*